10-1981

Nixon v. Fitzgerald

Lewis F. Powell Jr.

If Halperin is granted, this should be Held.

CADC dismissed Nixon's appeal. It did not affirm

Suppl. Brief from Resp.: resp has voluntarily dismissed his common law claims in the DC.

PRELIMINARY MEMORANDUM

May 8, 1980 Conference
List 5, Sheet 2
No. 79-1738

NIXON

v.

FITZGERALD

Cert to CADC (Tamm, Mikva) (order)[1]

Federal/Civil

Timely

SUMMARY: Petitioner Nixon, represented by private counsel, moves for expedited consideration of his petition for certiorari. The petition presents the issue whether a President is absolutely immune from civil damage liability.

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[1] Judge Robb was on the panel, but did not participate.

Hold for Halperin. Then, even if Halperin is taken, might deny outright because this is an unworthy appealability Q. Gray

FACTS: The facts as set forth in the petition are as follows: In 1968, respondent Fitzgerald blew the whistle on cost overruns in the C-5A transport program. Thereafter, his civil service status was terminated. These events occurred during the closing days of the Johnson administration. A year later, respondent's employment with the government was terminated as part of a general reorganization. Mr. Nixon was questioned about the matter at a press conference and promised to look into it. He then requested that respondent be given a Bureau of the Budget position. The BOB director, however, counselled against such an appointment because respondent was a "pipeline to Senator Proxmire." Nixon did not push the matter, but requested his staff to pursue other alternatives. None was found. In 1970 respondent left the government.[2]

In 1973 respondent was ordered reinstated by the civil service commission and awarded back pay. In 1974 he commenced this civil action against various federal officials, claiming (1) that his First Amendment rights were violated by the dismissal and (2) under implied causes of action pursuant to federal statutes protecting Congressional witnesses. See 5 U.S.C. § 7211; 18 U.S.C. § 1505. The suit was dismissed as

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[2] Respondent paints the President as an active conspirator, citing this taped statements:

> I said get rid of that son of a bitch. You know 'cause he is, he is doin' this two or three times.

Mr. Nixon says that he had some other person (a Mr. Gordon Rule who had criticized Roy Ash) in mind when he made this statement. The district court found "genuine issues of fact as to the scope of each defendant's responsibilities."

time barred. On appeal CADC reversed as to White House personnel concluding that prior to 1973 respondent had no reason to know of White House involvement in the dismissal. 553 F. 2d 220 (1977). On remand, respondent amended his complaint to add Nixon as a defendant.

HOLDINGS BELOW: Following his joinder, Nixon moved to dismiss on grounds of absolute immunity and qualified immunity. The District Court (Gessell) denied the absolute immunity motion on the authority of Halperin v. Kissinger, No. 79-880, and the qualified immunity request because of disputed facts. Nixon appealed as to absolute immunity. Respondent then moved to dismiss the appeal for lack of jurisdiction or in the alternative for summary affirmance. By order, CADC granted the motion to dismiss.

CONTENTIONS: Nixon raises two issues: (1) that he is entitled to absolute immunity for the reasons stated by the SG in Halperin and (2) that the district court's order was an appealable collateral order. He moves for expedited consideration of his petition advising the Court that trial is scheduled in this case for June 4 and that the District Court has "already refused to stay proceedings below even until this Court announces its action with regard to [Halperin v.] Kissinger." He argues that this case provides an excellent example of the perils of applying Butz to a President: it arises "out of the kind of activities that confronts a President daily ... and demonstrates that mistaken judgments on what may seem a trivial matter -- indeed, an internal executive

branch personnel dispute -- can later threaten a President's personal estate." Finally, he asserts, correctly, that the decision on appealability is directly contrary to Mitchell v. Forsyth, 79-1120 (CA 3), and in tension with Helstoski v. Meanor --- U.S. --- (1979).

RESPONSE: The response argues that CADC correctly decided the appealability question and that in any event the petition should be denied because: (1) Butz is controlling; (2) even if the President is absolutely immune on the constituional issues, the statutory claims will go to trial; and (3) this motion is filed solely as a delay-tactic.

DISCUSSION: I would grant Mr. Nixon's motion for expedited consideration. And if Halperin is granted, I would think this petition should be held.[3] It is important to recognize that the principal issue here is appealability. CADC dismissed the appeal; it did not summarily affirm. CADC's decision, however, may have been strongly colored by Halperin. A circuit that does not recognize presidential claims of absolute immunity is not likely to look kindly on interlocutory appeals of such claims. See Community Broadcasting v. F.C.C., 546 F. 2d 1022, 1025 (D.C. Cir. 1976)(one criterion for appealibility is presence of "a serious and unsettled question"). Hence, if Halperin were reversed and this case remanded in its light, CADC might alter its ruling. This Court's decision in Helstoski provides strong precedent for appealability: absolute

immunity like the speech-or-debate-clause privilege protects "not only from the consequences of litigation's results but also from the burdens of defending."

On the immunity issue, I continue to believe that Butz makes this a very hard case for the President to win.

There is a response.

Shechtman order in petn.

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[3] Some argument could be made for granting this petition with Halperin. Nixon has private counsel in this case who may raise points not made by the SG; and the conduct here arguably is less egregious than the Halperin wiretapping. (Though retaliation against a congressional witness is quite a serious charge.) A grant, however, would complicate matters by putting appealability in issue.

Court	*Voted on* ....., 19...	
Argued ....., 19...	*Assigned* ....., 19...	No. 79-1738
Submitted ....., 19...	*Announced* ....., 19...	

NIXON

vs.

FITZGERALD

Also motion to expedite consideration.

There is a petition for certiorari before appealability. JPS says no appealability. I'm not sure.

Hold for Kissinger

But Related for WHR who is not out of this.

(JPS will note he will take himself off list)

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION	ABSENT	NOT VOTING
Burger, Ch. J.	✓											
Brennan, J.			✓									
Stewart, J.	✓											
White, J.	✓											
Marshall, J.			✓									
Blackmun, J.	✓											
Powell, J.	✓											
Rehnquist, J.	✓											
Stevens, J.	✓											

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 79-1738

NIXON

vs.

FITZGERALD

Relisted for Mr. Justice Steven.

Held
for
79-880

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
Stewart, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.													
Rehnquist, J.													
Stevens, J.													

Not Circulated MRL

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1738

RICHARD NIXON,
Petitioner,

v.

A. ERNEST FITZGERALD,
Respondent.

JOINT STATEMENT OF THE PARTIES

Petitioner Richard Nixon and respondent A. Ernest Fitzgerald, by their undersigned counsel, jointly submit this statement to inform the Court concerning certain matters that have been the subject of erroneous news reports, which may have come to this Court's attention, and which concern the status of this case. The parties have learned that, following the announcement of this Court's May 19, 1980, action granting the petition for writ of certiorari in Halperin v. Kissinger, No. 79-880, some news agencies speculated that the instant action had been settled. This is incorrect. The parties continue vigorously to dispute whether the petitioner can be held liable to respondent in this case, a question presented

to this Court by the instant petition. The parties have agreed at this stage to fix the amount of payments to which respondent would be entitled in this case, but the amount of payment depends upon this Court's disposition of the instant petition and subsequent proceedings in the District Court. Therefore, the case has not been settled and is not moot.

Respectfully submitted,

R. Stan Mortenson

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 2, 1981

79-880 Kissinger v. Halperin

MEMORANDUM TO THE CONFERENCE:

This refers to Thurgood's memorandum of May 27, and to what action the Court should take in this important case.

We now are deadlocked 4-4 on the central issue of presidential immunity. Having completed his review of the historical evidence, Thurgood no longer would accord absolute immunity to a President. Nor would he hold that a President is immune from a Bivens-type action.

Thurgood could "join a majority" to grant reargument, consolidated with Nixon v. Fitzgerald and Harlow v. Fitzgerald. For the reasons indicated in my memorandum of May 26, I do not think reargument would serve a useful purpose.

With the exception of the Nixon Tapes Case, I have taken part in no case that has received as careful and exhaustive (and exhausting!) consideration as this one. Between us, Byron and I have circulated, and several times revised and recirculated, memoranda that now total nearly 100 printed pages in their latest versions. Historical research also has been thorough, with Thurgood completing his only recently. The careful consideration we have given this case was against the background of lengthy opinions by the DC and CADC, and thorough briefing by competent counsel.

I think it fair to say that the only realistic chance of resolving the present deadlock is to have a full Court. Bill Rehnquist's memo of May 27 reaffirms that Mitchell's presence as a party in the Kissinger case is the only reason he has been a "bystander". Presumably, he therefore would be able to participate in the Fitzgerald cases, as Mitchell is not involved in either. On the other hand, I assume - unless Bill advises us to the contrary - that if we set Kissinger for reargument and also granted the Fitzgerald cases, Bill still would be "out" - at least with

respect to any issue that might affect Mitchell. We therefore in all probability would find ourselves again without a full Court. Also we would have assumed the unnecessary burden of a reargument and the parties would bear the burden of the consequent delay.

Although no course of action is without some negatives, I recommend that we affirm CADC by our present 4-4 vote, and at the same time grant certiorari in the two Fitzgerald cases. As Mitchell no longer will be a party before this Court, Bill Rehnquist could sit and thereby give us a full Court.

An affirmance would result, I suppose, in the Kissinger case being remanded to the District Court for trial on the basis of CADC's opinion - the reasoning of which has not been fully accepted either in Byron's memorandum or mine. This is not a desirable situation, but there are several possibilities. The Kissinger case may not come to trial in the DC before we decide the Fitzgerald cases. If the DC case is tried to judgment, we can only speculate as to the outcome. Depending on the evidence, it could be mooted. In any event, it seems to me that we would be free to decide the Fitzgerald cases without regard to a case that no longer was pending before this Court.

I have had my clerk, Paul Smith, review carefully the Fitzgerald cases to make sure that we could reach the merits, and that some - if not all - of the major questions presented in Kissinger are squarely presented. As the enclosed memorandum indicates, there is no serious procedural question - at least none for me. The issues with respect to the President - both absolute immunity and Bivens - are clearly presented. With respect to Harlow and Butterfield, we also could decide whether a Bivens suit lies against them, and the type of immunity available. The Title III issue is not presented, as these are not wiretapping cases. That issue may now be less important because the new 1978 Act would control in future cases involving foreign intelligence. In any event, in Fitzgerald we should be able to address and decide the more fundamental questions.

L.F.P., Jr.

ss

06/02/81

Memo re: The Fitzgerald Cases: Nos. 79-1738, and 80-945

Background

In 1968, Fitzgerald, a Deputy Assistant Secretary of the Air Force, testified before Congress concerning the cost overruns accompanying manufacture of the C5A aircraft. About a year later, his employment was terminated in what was described as a reorganization at the Department of the Air Force. He obtained reinstatement administratively, but is seeking damages in court under the First Amendment, some federal statutes, and D.C. common law. The Air Force defendants were dismissed on statute-of-limitations grounds, but the White House defendants (Nixon, Harlow and Butterfield) were not. The CADC reasoned that Fitzgerald had no reason to know of White House involvement for several years, and the statute therefore was tolled.

The allegations made by Fitzgerald are based on the argument that he was terminated in retaliation for his testimony before Congress. He alleges that this decision was made in the White House itself. In addition to a First Amendment claim, he asserts implied rights of action under 5 U.S.C. § 7211 (employees' right to petition Congress) and 18 U.S.C. § 1505 (criminalizing the act of injuring a congressional witness), as well as two common-law tort claims: intentional infliction of mental distress and intentional inteference wiht economic advantage.

Defendants' motions for summary judgment on immunity grounds were denied by Judge Gesell. He rejected absolute immunity on the authority of the CADC opinion in Kissinger. He refused to grant judgment on qualified-immunity grounds, finding disputed issues of fact. Petrs brought an immediate appeal to the CADC, which dismissed the appeal. Petrs then sought cert in this Court.

Possible Procedural Problems

The petitions in these cases were timely. The only possible procedural problem involves the appealability of the DC's denial of summary judgment. Petrs brought immediate appeals on the theory that the availability of absolute immunity is a collateral issue that may be appealed as soon as it is decided. They argue that the purpose of absolute immunity would be disserved if they were forced to

go through a trial before appealing. They point to Helstoski v. Meanor, 442 U.S. 500 (1979), in which the Court held that a Congressman may bring an immediate appeal from denial of a motion to dismiss an indictment on Speech or Debate Clause grounds. The Court relied on an analogy to Abney v. United States, 431 U.S. 651 (1977) (immediate appeals of denials of double jeopardy motions), holding that the immunity of the Speech or Debate Clause includes the right to avoid undergoing a trial.

Helstoski provides strong support for petitioners' right to appeal from the denial of their motion for summary judgment on grounds of absolute immunity. A Third Circuit decision, also being held for Kissinger, supports this view. Forsyth v. Kleindienst, 599 F.2d 1203, 1208-09 (1979), cert. pending sub nom. Mitchell v. Forsyth, No. 79-1120. The CA2 has recently denied a motion to dismiss an appeal in a similar situation. Clark v. United States, 624 F.2d 3, 4 (1980).

In dismissing the appeal, the CADC may have concluded that the issue of absolute immunity was sufficiently settled after its decision in Kissinger to render the appeal frivolous. But the availability of absolute immunity could not have been considered settled, even in the DC Circuit, as long as Kissinger remained in this Court. Thus, the Court can decide that the CADC erroneously dismissed the appeal. Although it could then

remand for a decision on the merits of the immunity defense, there would be no requirement that it do so. The CADC dismissed the appeal--presumably based on its view that it presented no substantial issue. This view could be corrected by this Court in the present cases. I see no reason why the Court could not reach the merits.

The only other argument against granting these cases would be that they are at a pretrial stage, so that there is little factual development. But the claim of absolute immunity does not require findings of fact. The Court could assume the truth of Fitzgerald's allegations and decide the immunity question on that basis.

Issues Presented

These cases would present the basic issues the Court sought to decide in Kissinger, plus several others. Nixon has been sued under the Constitution, federal statutes, and common law. The First Amendment claim therefore raises the issue whether a Bivens action can be brought against a President. It also presents the issue of absolute Presidential immunity from constitutional suits. In addition, the Nixon case involves the scope of Presidential immunity from suits under the common law and implied under federal statutes. The last decision of this Court to discuss common-law immunity--Barr v. Matteo, 360 U.S. 564 (1959)--held that federal officials performing

their official duties are absolutely immune from state tort claims.

Harlow and Butterfield claim absolute immunity derivative of the President's, and thus this question is common to one presented in Kissinger. The issue of absolute immunity for national security actions does not appear to be presented.

June 15, 1981

79-1738 Nixon v. Fitzgerald
80-945 Harlow v. Fitzgerald

Dear Chief:

In light of our discussion of the Kissinger case last Thursday, I will draft and send to the Justices a brief Per Curiam that we can approve finally at next Thursday's Conference.

Meanwhile, with your approval, I am requesting Al Stevas to put the two Fitzgerald cases on the list for next Thursday.

Sincerely,

The Chief Justice

lfp/ss

cc: Mr. Justice Stevens
Mr. Alexander L. Stevas

Paul – If Qs in P. petition are not adequate, try framing one?

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 16, 1981

Also, should we add one on Bivens?

MEMORANDUM TO THE CONFERENCE

Re: No. 79-1738 - Nixon v. Fitzgerald, and
No. 80-945 - Harlow and Butterfield v. Fitzgerald

If, as is quite likely, certiorari is granted in these two cases, it is possible that there will be different rulings with respect to the President and the other petitioners, i.e., it may be that the President will be held to have absolute immunity but the advisors only qualified immuity. Under their third question presented, the advisors assert that even if they are entitled to only qualified immunity, they should not have been sent to trial.

I write this memorandum to indicate that I remain of the view expressed in the early circulations in Procunier v. Navarette, 434 U.S. 555 (1978), that qualified immunity in cases like this should turn on objective factors, rather than malice or bad faith, whatever these latter considerations may involve. If when the challenged action is taken, it did not contravene a settled law -- that is, it was reasonable for the official to believe that his action was within the law -- I would hold the official immune, whether state or federal, absent some congressional guidance mandating a different result. Turning immunity on objective factors would make far better sense and would go far to avoid needless trials and possibly inaccurate results. | Yes

Perhaps this issue is subsumed in the third question in Harlow and Butterfield's petition but it might be advisable to address the question. Yes

BRW

79-1738

6/16/81

79-880 KISSINGER v. HALPERIN

PER CURIAM

The judgment with respect to petitioners, Kissinger, Nixon and Mitchell is affirmed by an equally divided Court. With respect to petitioner Haldeman, the writ of certiorari is dismissed as improvidently granted. Justice Rehnquist took no part in the consideration or decision of this case.

PS 06/16/81

Granted 6/18

To: Mr. Justice Powell

From: Paul Smith

Re: Nos. 79-1738, 80-945 (Fitzgerald)

I do not see why Justice White would find it necessary to frame a separate question for the parties in order to reach his view of the nature of qualified immunity. The third question presented in No. 80-945 is whether the lower courts have "in routinely requiring a trial upon the defense of qualified immunity, ... thereby vitiated the defense and thwarted this Court's decision in Butz v. Economou." Thus the issue of the nature of qualified immunity as applied to Harlow and Butterfield is presented.

With respect to the issues you wish to decide, it is unnecessary to frame any new question with respect to absolute immunity. Question 1 in No. 79-1738 asks whether

"a President is absolutely immune from civil damage liability for actions taken, or for failures to act, while President of the United States." Question 2 in No. 80-945 asks whether "petitioners [Harlow and Butterfield], as senior adviers to the President of the United States, should be subject to the risk of trial and civil damages from a person claiming injury from an adverse personnel decision of a federal executive department."

As you suggest, however, it might be useful to pose a question regarding the availability of a Bivens action. The Court could ask the parties to address whether "a right of action for damages exists against a President of the United States and his senior advisers for an alleged violation of First Amendment rights." Perhaps you should press this point only if Justice White already has convinced the Conference to pose a question for him.

Argued ....., 19... *Assigned* ....., 19... No. 79-1738

Submitted ....., 19... *Announced* ....., 19...

NIXON

vs.

FITZGERALD

Heretofore held for decision in No. 79-880, Kissinger v. Halperin.

No need to ask argument on Bivens

Grant

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.		✓											
Brennan, J.			✓										
Stewart, J.		✓											
White, J.		✓											
Marshall, J.			✓										
Blackmun, J.		✓											
Powell, J.		✓											
Rehnquist, J.		✓											
Stevens, J.		✓											

PS 07/17/81

To: Mr. Justice Powell

From: Paul Smith

Re: Immunity Issues in Fitzgerald and Kissinger

In Justice White's opinions in Kissinger, he criticized our proposed disposition with respect to Mitchell and Kissinger on the ground that absolute immunity for national security actions was "absolute" in name only. He argued that this immunity depended on a showing of subjective purpose on the part of a defendant, and thus is little different from a qualified immunity standard--which premises liability on a showing of subjective malice or objectively unreasonable conduct. As you remember, Justice Stevens had the same basic objection to the proposed rule, but was unable to produce an alternate proposal that would offer protection for national security actions without

immunizing officials like Kissinger and Mitchell across the board, regardless of the purpose of their actions.

In his opinion, Version II, 2d draft, at 35, Justice White suggests that he has argued in the past for a purely objective standard for qualified immunity. Such a standard would grant immunity unless it can be said that conduct violated clearly established constitutional rights of which an official should have been aware. This standard is not the one established in Justice White's opinions in Wood v. Strickland, 420 U.S. 308 (1975), and Butz v. Economou, 438 U.S. 478 (1978). There he held that liability can be premised either on objective unreasonableness or on subjective bad faith. In your separate opinion on Wood, 420 U.S., at 327, you also adopted a two-part test. You were concerned that Justice White had gone too far in requiring officials to be aware of "established" constitutional norms. But you too would have allowed liability whenever there was actual bad faith or unreasonable conduct.

The attractiveness of a purely objective test is that it makes the immunity issue basically legal: was the constitutional law in this area sufficiently established to expect knowledge on the part of this official in these circumstances. Therefore it would be easier with an objective standard for a defendant to win summary judgment when faced with a frivolous claim. The same is not true when a plaintiff alleges a violation of constitutional

rights in an area of legal uncertainty, but alleges subjective bad faith. An intent to deprive someone of constitutional rights is hard to disprove prior to a full trial. Thus, an objective test might be a way to allow greater strictness of the part of courts faced with suits against officials. As you know, both the Butz opinion, 438 U.S. at 508, and Judge Gesell's concurrence in Kissinger expressed the hope that courts can dismiss most such cases at an early stage.

As a result, if the Court ultimately decides not to grant absolute immunity to the President in Fitzgerald, at the very least you might seek to apply an objective standard allowing the President to gain dismissal of cases involving areas of constitutional uncertainty. The only problem with such an approach in Fitzgerald is the potential conflict with our reasoning in Kissinger, as discussed above. As I said, we sought to apply a subjective test in Kissinger in deciding whether the aides possessed absolute immunity. Fitzgerald will not require you to repeat this argument, since the actions plainly do not involve national security. But an emphasis on objective tests in Fitzgerald might make it difficult to make such an argument in the future. If, on the other hand, you can win absolute immunity for the President in Fitzgerald, while applying normal qualified immunity principles to the aides, the case

will not prevent a future decision authorizing absolute immunity for aides acting to protect national security.

I'm afraid this is all the wisdom I can offer at this point. Perhaps the infusion of a new clerk's point of view will help with these intractable problems. I've briefed Dick, and tried to arrange the file to make it useful next Term.

August 24, 1981

Subject: Fitzgerald Cases

Dear Chief,

As you will remember, these two cases present most of the immunity issues that were before us in Kissinger.

When we granted them in June, I believe we planned on having them set in October so that there would be a chance to decide them before the Kissinger case is tried by the District Court.

To avoid another 4/4 split, it is essential that we have a full Court. I understand that Judge O'Connor's confirmation hearing commences about September 9. If she is confirmed promptly, as I would expect, she should be ready to participate in the October cases.

However, in view of the complexity of the issues (the memos that Byron and I circulated totalled almost 100 pages!), it may be desirable to defer the Fitzgerald cases until November. This would assure that Judge O'Connor has an opportunity to prepare herself.

Sincerely,

The Chief Justice
Supreme Court of the United States
1 First Street, N. E.
Washington, D. C. 20543

LFP/djb

rhf 11/25/81

BENCH MEMORANDUM

TO: Mr. Justice Powell

FROM: Dick Fallon

DATE: November 25, 1981

RE: Nos. 79-1738 and 80-945, Nixon v. Fitzgerald and Harlow v. Fitzgerald

Question Presented

The main question in this case involves the scope of a President's immunity from a private suit for damages arising from his actions as President of the United States. The immunity of presidential aides is also in issue. In addition,

there are jurisdictional questions. One concerns the "contingent settlement" negotiated by Nixon and Fitzgerald. Another involves the claim that this suit for damages is barred by congressional provision of an exclusive administrative remedy.

I. BACKGROUND

A. Facts

The events underlying this suit occurred during the waning days of the administration of Lyndon B. Johnson. The respondent Ernest Fitzgerald was at that time a Deputy Assistant Secretary for Management Systems of the Department of the Air Force. Late in 1968 Fitzgerald met with members of Senator William Proxmire's Subcommittee for Economy in Government of the Joint Economic Committee. Fitzgerald disclosed a pattern of cost over-runs involving the C-5A transport aircraft. On November 13, 1968 he testified publicly that cost overruns on the plane could approximate $2 billion.

At this juncture the facts become subject to dispute. For purposes of this Court's analysis, however, all of Fitzgerald's allegations should be taken as true.

Fitzgerald claims that his testimony caused a deterioration in his relationship with officials of the Johnson Administration. Shortly after his testimony Fitzgerald received notice that his career civil service status--given to him only shortly before the date of his congressional testimony--was being revoked. (The Civil Service Commission

found that the revocation constituted the correction of a bona fide administrative error. JA 74a, 82a. Fitzgerald characterizes it as retaliation for his truthful testimony.) In addition, Fitzgerald alleges that Johnson's Air Force Secretary, Harold Brown, advised his successor, Robert Seamans, that Fitzgerald could not be trusted and should not be retained.

According to Fitzgerald, Secretary Seamans had scarcely assumed office before he began to consider schemes to discharge Fitzgerald pursuant to an "office reorganization." With this in mind Seamans consulted White House aide Bryce Harlow in May and November 1969. White House aide Alexander Butterfield also wrote a memorandum in May 1969, in which he reported to his White House superior John Ehrlichman that Fitzgerald was "about to blow the whistle on the Navy." JA 274a. Butterfield said that he understood the matter to have been reported to the FBI. He apprised Ehrlichman in case other action might be appropriate.

Allegedly as a result of White House hostility, Fitzgerald's job was abolished as part of a reorganization that took effect on January 5, 1970. Secretary Seamans signed the reorganization order on November 3, 1969, and the decision was announced the following day.

Fitzgerald's firing attracted considerable publicity. In order to advise the President how to respond, at least one member of the White House staff, Clark Mollenhoff, telephoned Secretary Seamans to determine the basis for Fitzgerald's

discharge. In addition, Secretary Seamans consulted with White House aide Bryce Harlow on November 4, the day that Fitzgerald's firing was announced. White House staff included a summary of developments in the "briefing book" prepared in anticipation of a presidential press conference scheduled for December 8, 1969. In the book, staffer Patrick Buchanan urged the President to adopt Mollenhoff's recommendation and retain Fitzgerald. JA 267a. When queried at the press conference, however, President Nixon stated only that he would look into the matter. (According to a subsequently released White House tape, the President recalled that Harlow was "all for canning" Fitzgerald. JA 282a. Ronald Ziegler's recollection was different, and he so advised the President. Id.)

White House interest in the Fitzgerald case continued at least through January 1970. Butterfield was delegated to prepare a memorandum for the press office. In addition, Butterfield reported privately to Haldeman, to whom he recommended that Fitzgerald should not be reemployed.

Following his firing, Fitzgerald initiated an administrative proceeding before the Civil Service Commission (CSC) seeking reinstatement and backpay. He filed his claim on January 20, 1970. After three years of litigation, the case finally came up for public hearing in January 1973. On January 30, 1973, Secretary Seamans testified that he had "never received any instruction" from the White House regarding the Fitzgerald matter. But Seamans refused to answer further questions about his communications with the White House.

Seamans repeatedly invoked Executive Privilege.

As a result of the publicity attending the Fitzgerald hearings, President Nixon was again asked about the matter at a press conference of January 31, 1973. The President on this occasion took full responsibility for the termination of Fitzgerald's federal employment: "I was totally aware that Mr. Fitzgerald would be fired or discharged or asked to resign. I approved it and Mr. Seamans must have been talking to someone who had discussed the matter with me. No, this was not a case of some person down the line deciding he should go. It was a decision that was submitted to me, and I stick by it." JA 185a.

The following day, however, the White Huse issued a retraction of the President's statement. According to the White House press office, the President had confused Fitzgerald with another civilian employee of the Defense Department. As reported by press secretary Ronald Ziegler, "[The President] indicated to me after reading the transcript of yesterday's press conference that he was mistaken in his reference to Mr. Fitzgerald and that the fact of the matter is that the President did not, as indicated yesterday in the press conference, have put before him the decision regarding Mr. Fitzgerald." JA 196a.

The Civil Service Commission issued its ruling on the Fitzgerald case on September 18, 1973. The CSC found that "the evidence of record does not support the allegation that his position was abolished ... in retaliation for his

[Congressional] testimony." JA 81a. But the CSC also ruled that the abolition of Fitzgerald's job "resulted from reasons purely personal to" him. JA 86a-87a. It therefore violated the governing statute, which established that reductions in force should be implemented without regard to the persons holding the affected positions. Id. On this basis the CSC ordered Fitzgerald reinstated, either to his old job or an equivalent position, with backpay. JA 87a-88a. The administrative award included no provision for interest or for punitive damages.

In January 1974 Fitzgerald instituted the present action in the U.S. District Court for the District of Columbia. He sought $3.5 million in compensatory and punitive damages from eight Air Force and Defense Department officials and from Alexander Butterfield. The district court dismissed the suit based on the district of Columbia's three-year statute of limitations. 384 F. Supp. 688 (1974). The Court of Appeals affirmed the dismissal as to all defendants except Butterfield. Finding that Fitzgerald had no reason to know of Butterfield's involvement until 1973, the court permitted the suit against him to go forward. 553 F.2d 220 (1977).

Following the remand to the District Court, Fitzgerald filed a second amended complaint. It was only at this late date in the litigation that the petitioners Nixon and Harlow were added as defendants. The complaint alleged generally that they, together with unnamed others, had conspired to retaliate for Butterfield's testimony on the C-5A transport plane. The

complaint asserted eight causes of action, arising under the constitution, federal statutes, and the common law of the District of Columbia. Of these, only three remain. One is based on the First Amendment; one on 18 U.S.C. § 1505, a criminal statute proscribing retaliation against anyone for testimony given to a congressional committee; and one on 5 U.S.C. § 7211, which provides that the right of employees to furnish information to Congress "may not be interfered with or denied."

Upon Richard Nixon's being named as a defendant, the Justice Department moved on his behalf to dismiss the complaint on the ground that he was entitled to absolute immunity from civil liability for the actions alleged. Judge Gesell initially denied the motion based on the state of the record. After extensive discovery, he again denied a motion to dismiss. The Court of Appeals had by then rendered its decision in Halperin v. Kissinger, which found that the President did not enjoy absolute immunity from suits for civil damages. The various defendants in the action sought to appeal the denial of their immunity claims to the Court of Appeals. They claimed the right to do so pursuant to the collateral order doctrice. But the court of appeals summarily dismissed the appeal, apparently on the basis of Halperin v. Kissinger.

A petition to this Court ensued. After it was filed, but before it was granted, Nixon and Fitzgerald agreed to a "contingent settlement." On May 18, 1981, Nixon agreed absolutely to pay Fitzgerald the sum of $142,000.

Contingently, Nixon agreed to pay an additional $28,000 if two conditions were satisfied: (a) if this Court should grant the pending petition for cert and (b) if it should give a decision that would result in the District Court's dismissal of the case against Nixon "without additional adjudication of the facts, other than upon the record as it presently stands." On June 10, 1980, the parties filed a "Joint Statement" in this Court. The Statement asserted that "The parties have agreed at this stage to fix the amount of payments to which respondent would be entitled in this case, but the amount of payments depends upon this Court's disposition of the instant petition and subsequent proceedings in the District Court. Therefore the case has not been settled and is not moot."

The Court granted the petition on June 22, 1981. Shortly thereafter Morton Halperin filed papers seeking to intervene. Calling attention to the contingent settlement agreement, he alleged that the parties could not be trusted to contest the issues with all appropriate vigor. This Court denied the motion.

II. JURISDICTIONAL ISSUES

There are three possible jurisdictional barriers to a decision of this case on the merits: (a) the possibility that the settlement between Nixon and Fitzgerald has "mooted" the controversy between them or otherwise deprived them of the "concrete adversity" needed for them to invoke the jurisdiction of this Court; (b) the claim of petitioners Harlow and

Butterfield that Fitzgerald's administrative remedies before the CSC were intended by Congress to be exclusive and thus deprived the federal courts of jurisdiction to hear this suit; and (c) the argument that the district court's denial of absolute immunity is not an appealable "final order."

Although I do not regard any as a likely bar to reaching the merits, each deserves discussion.

A. The Settlement Agreement: Mootness Question

As a result of the settlement agreement between Nixon and Fitzgerald, there will never be a trial on the merits in the District Court. If this Court gives a decision in favor of Fitzgerald, he has agreed--in return for consideration of $28,000--to move in the District Court for dismissal. If this Court gives a decision in favor of Nixon on the question of "absolute immunity," then again there will be no trial.

On one view of Article III, this Court's only justification for deciding constitutional issues is to permit the adjudication of actual cases and controversies in the district courts . As a result of the settlement agreement, it can be argued that this case has ceased to be justiciable, because the parties have indicated that they do not wish to proceed to judgment in the district court--only to get an answer to the "absolute immunity" question, on which they have a "bet."

I find the "settlement agreement" troubling, because it gives the appearance that the parties--who have settled their main financial dispute--may nonetheless "buy" a decision of

this Court. Nonetheless, it is difficult to identify a jurisdictional doctrine under which dismissal would be required.

Mootness. The case is not moot. Both parties retain a financial stake in the outcome; and their interests continue to be adverse. It does not matter, I think, that there will be no trial in the district court. There would similarly be no trial in cases in which a purely legal issue was presented to this Court in a suit for a declaratory judgment--e.g., a case turning solely on the constitutionality of a state statute, under which a criminal prosecution was threatened. If this Court upholds the statute, the declaratory judgment issues without further trial. If the Court voids the statute, there will still be no further trial. In addition, the so-called "bet" in this case has not entirely replaced an interest in judicial resolution. It is obvious that both parties plan to return to the district court for the entry of a judgment, regardless of this Court's decision.

One way to assess the mootness argument is to compare this case to one in which the parties have bought "insurance" against an adverse judgment. Assume there were no agreement between Nixon and Fitzgerald, but that both sought to buy insurance in a private market. Nixon pays a private insurer $142,000, in return for which the insurer agrees to pay any judgment against him, less $28,000--i.e., Nixon would pay no more money if he won in this Court, and could pay no more than $28,000 if he lost. This is exactly where he stands under the

present contract. It is also possible to imagine Fitzgerald, through a private "insurance" of his financial interest in the outcome of the suit, getting into the same position in which he now stands. A contract of this kind--which resembles the sale of an interest in litigation--might offend public policy in some circumstances. But I would not think always. This is one way to analyze a plaintiff's agreement to pay a lawyer a "contingent fee."

Finally, I am told that private litigants not infrequently make "contingent settlement" agreements similar to that negotiated here. In private litigation, I am told (by another clerk), the parties sometimes agree to settle, with the amount of liability to depend on the district court's ruling on a particular pretrial motion--a discovery motion for example. It is easy to imagine cases in which the scope of permissible discovery would determine the settlement value of a claim. And it is hard to imagine a public policy against promoting settlements in such cases.

I am at a loss, however, to know how to investigate further the use of "contingent settlements" in private litigation. If I discover anything, I shall inform you.

Feigned and Collusive Cases

This Court has consistently refused to hear cases in which the parties, although formally independent, are cooperating to achieve the same result, e.g., Lord v. Veazie, 49 U.S. 251 (1850)(sale and suit on contract arranged in order to procure judgment on navigation rights on public river), and where the

interests of the parties, though formally adverse, are not adverse in fact, e.g., South Spring Hill Gold Mining Co. v. Amador Medean Gold Mining Co., 145 U.S. 300 (1892) (pending appeal, ownership of both plaintiff and defendant corporations came into hands of same persons).

It is easy to distinguish the current case from cases of this kind. Nixon and Fitzgerald have adverse legal interests cognizable in a federal court--i.e., their interests in a resolution of the immunity question, which may be crucial to the outcome of a suit for damages. Their interests are adverse in fact: each stands to gain or lose financially, depending on how this Court decides the case. It is true that Nixon and Fitzgerald have structured their relationship in a way that most adverse parties do not. But this alone would not seem to defeat justiciability. The Court has permitted parties to go so far as purposely to create an adversary relationship solely in order frame a "test case." E.g., Evers v. Dwyer, 358 U.S. 202 (1958) (although the negro plaintiff had ridden bus only once, and did so in order to provoke an order to sit in the back, the controversy that resulted was still "real"). Here, there is no doubt that Nixon and Fitzgerald began in a concretely adverse relationship. If parties can deliberately create such a relationship in order to frame a justiciable controversy--and Evers v. Dwyer holds that they can--then, by the same logic, the parties here should be able to structure their relationship so that it would continue to be adverse.

Nonadversity With Regard to Granting of Cert

For a while it seemed to me to be troublesome that, following the conclusion of their contingent settlement agreement, Fitzgerald no longer held an interest adverse to Nixon's interest--asserted in his cert petition--in having this Court take the case on certiorari. Fitzgerald, though formally opposing a grant of cert, could collect an additional $28,000 only if this Court both granted cert and decided the issue favorably to him. It is disturbing that he did not confess this candidly. Nonetheless, his posture would not seem ultimately to defeat justiciability. The rules of this Court do not require a party to oppose a petition for cert. And it is easy to imagine cases--e.g., cases involving a split among the Circuits--in which both parties would be eager for this Court to resolve the split. Thus, from Fitzgerald's side, lack of adversity would not seem to be troublesome.

Nixon's stake in the cert petition is less easy to fit into a traditional legal category. Following his settlement agreement with Fitzgerald, in a financial sense Nixon no longer stood to gain anything if the Court took the case; under no circumstances would Fitzgerald be required to pay Nixon anything. On the other hand, a grant of cert put Nixon in a position where he could lose up to $28,000. Yet he was the petitioner.

After he entered the settlement agreement, I do not think that Nixon had a legally cognizable interest, of the kind needed to support "standing" to bring a suit, in having this Court grant certiorari. His financial interest lay in

dismissal. Any other interest was "abstract" in the sense of being unrelated to his conflict with Fitzgerald. But I am not sure that this matters. At every stage of judicial decision--from decision in the district court through decision by this Court--there would be concrete adversity between the parties. It is adversity at these stages that is needed to frame issues in a proper light for judicial resolution.

Integrity of the Judicial Process

As the commentators have often noted, it is hard to reconcile all of this Court's justiciability decisions. Curiously, the decisions most difficult to fathom are several of those in which the Court has denied justiciability. Of the seeming anomolies, two seem to me to require some passing mention. They are Muskrat v. United States, 219 U.S. 346 (1911) and United States v. Johnson, 319 U.S. 302 (1943).

Muskrat involved a dispute over entitlement to share in money and lands due to the Cherokee Nation. By a legislative act of 1906, Congress expanded the class of those entitled to claim as Cherokees. By legislative act of 1907, Congress then conferred federal jurisdiction to hear a suit by those Cherokees disadvantaged by the 1906 act, by which they were required to divide their settlement into more, smaller shares. Muskrat sued under the 1907 jurisdictional act. Naming the United States as defendant, he argued that the 1906 act was unconstitutional because it deprived him of a property interest without just compensation. This Court held there was no Article III jurisdiction, on the ground that Congress had

effectively asked the Court to render an advisory opinion.

In the other case, United States v. Johnson, the Court dismissed a suit in which the plaintiff was not in fact adverse. Though the plaintiff did have an actionable claim that the rent he was forced to pay rent in excess of the limit imposed by a federal rent control statute, the plaintiff was in fact paid to bring the suit by the defendant in the action, who wanted to litigate the constitutionality of the federal statute. The Court explained that "Such a suit is collusive because it is not in any real sense adversary. It does not assume the 'honest and actual antagonistic assertion of rights' to be adjudicated--a safeguard essential to the integrity of the judicial process, and one which we have held to be indispensable to adjudication of constitutional questions by this Court." This was held to be so even though the United States had intervened and stood prepared to defend the constitutionality of the challenged statute. With the government in the case, adversariness was patent. Nor could there be any question of the adequacy of the representation.

It is easy to cite cases in conflict with both Muskrat and United States v. Johnson. And neither of course bears directly on this case. But both can be best explained, I think, by reference to this Court's concern to maintain the integrity of judicial form. Both cases involved justiciable "issues," if they had been framed by parties to a "real" lawsuit. And there was adversary representation in both. But litigants in both--the United States in Muskrat and the collusive private

plaintiffs in Johnson--had conspicuously asked the Court to decide questions merely because they wanted them answered. Though an appropriately adversary posture was developed, that adversity bore insufficient resemblance to the kind of real-world adversity that courts exist to resolve. It smacked of manipulation.

It is hard to extract a legal principle. But I think the Court should be bothered about what Nixon and Fitzgerald have done, for essentially the same reasons that I think troubled the Court in Muskrat and in United States v. Johnson. If it decides to reach the merits--as I have no doubt that it can--I think that there may still be an unfortunate devaluation of the integrity of judicial form. If so, this cost should be faced.

B. Allegedly Exclusive Administrative Remedies

The petitioners Harlow and Butterfield invite this Court to avoid the immunity question by ruling that Fitzgerald has no federal cause of action.

At the outset, it seems clear that this issue need not bar the Court from reaching the immunity question. Indeed, the "cause of action" question itself need not be reached, as it was not among those raised in the cert petition. This case is here under the "collateral order" doctrine for a decision of the immunity issue. The "cause of action" question can still be raised following a final judgment.

Nor does Fitzgerald's pursuit of administrative remedies--reinstatement and backpay from the Civil Service Commission--necessarily bar him from seeking more complete judicial relief.

Where an agency possesses "primary jurisdiction" over the subject matter of a dispute, a plaintiff must ordinarily take his grievance there in the first instance. The Court has enforced this rule even in cases where the administrative agency can give only partial relief. See, e.g., Far East Conference v. United States, 342 U.S. 570 (1952). Resort to a judicial forum is subsequently barred only when Congress intended an alternative remedy to be exclusive. See New York Gaslight Club v. Carey, 447 U.S. 54, 66 (1980).

In this context it seems clear that Congress intended to impose no special limits on remedies that would otherwise be available. (This is not, of course, to say that Congress affirmatively intended that judicial relief would be available. See infra.) Fitzgerald was a member of the unclassified civil service. He was able to challenge his dismissal only because of his veterans' status: Congress has provided veterans with this special benefit. Thus, if Fitzgerald were not a veteran, he would have had no administrative relief whatsoever. The question thus becomes: Did Congress, in giving veterans a special right to administrative relief before the CSC, intend to preempt a cause of action for damages that would otherwise exist under federal statutes or the Constitution? Without doing extensive research in the legislative history, the question answers itself. Congress intended to favor veterans, not to deprive them of a benefit that they would otherwise have enjoyed.

But would Fitzgerald, otherwise, have had a cause of

implied cause of action

action for damages? Although it need not be reached, I point to this question now, for the following reason. In last year's draft opinions in Halperin v. Kissinger, your "second version" would have held that Halperin had no Bivens claim against the President, due to the "special factors" attaching to the President's constitutional status. In this case, by contrast, Fitzgerald claims three causes of action: two "implied" rights under federal statutes as well as a Bivens action under the First Amendment. It is in many ways attractive to deal with the immunity issue on Bivens grounds: no cause of action against the President. In this case, however, the immunity issue would still arise unless the Court also held that Fitzgerald had no cause of action under either of the federal statutes. It seems to me entirely plausible to argue that he would not. In light of the decision in the recent implication case involving the CFTC, however, it seems doubtful that this would be a winning argument.

Fitzgerald's "causes of action" - Bivens under 1st Amend., implied actions under two fed statutes. Even if no Bivens cause of action, we would still have the "implied causes" under two fed acts

I shall return to this issue in the discussion "on the merits."

C. Appealable Collateral Order (Frivolous issue)

Although a question is raised, I think the objection is frivolous. Immunity "was designed to protect [officials] not only from the consequences of litigation's results, but also from the burden of defending themselves." Helstoski v. Meanor, 442 U.S. 500, 508 (1979), quoting Dombrowski v. Eastland, 387 U.S. 82, 85 (1967). In order to protect the interests that immunity serves, this Court has at least twice allowed

interlocutory appeals of immunity defenses under the Cohen "collateral order" doctrine. Helstoski, supra (denial of claim of immunity under Speech and Debate Clause); Abney v. United States, 431 U.S. 651 (1977)(denial of immunity claimed under double jeopardy clause). Before the D.C. Circuit's decision in this case, all courts of appeals to consider the issue had agreed: denials of claims of executive immunity are similarly appealable. Although the Court of Appeals did not explain its summary denial in this case, it seems most reasonable to think that there was no colorably appealable issue under the law of the Circuit, established by Kissinger v. Halperin, 606 F.2d 1192 (CADC 1979).

III. MERITS: CONTENTIONS OF THE PARTIES

I do not think that the parties add much to the arguments exhaustively rehearsed in Kissinger v. Halperin. As I understand the cases, there are two main differences, both probably more relevant to the arguments developed by Justice White than to those presented in your circulated drafts. First, there is no federal statute, involved here, that directly creates a cause of action arguably enforceable against the President. Fitzgerald's cause of action, if any, arises by implication from one of two narrower statutes or from the Constitution itself. Your "absolute immunity" position permits you to bypass the question whether a cause of action can be inferred under either of those statutes. The cert petitions presented no "cause of action" question; this Court can decide the immunity question without reaching it.

Differences on merits bet. these cases + Kissinger Cert Tesar. Both affect BRW primarily

As Cert. petitions present no "cause of action" question, we can reach immunity issue w/o reaching it

I am uncertain, however, what approach Justice White might take. There seem to be two lines open to him. First, in order to "deconstitutionalize" the issue, Justice White might argue (a) that a cause of action can be inferred under one or both of those statutes; (b) that the relief available is so thorough as to make a decision on the Bivens claim unnecessary; and (c) that no "judge-made" immunity is needed under the statutes. Alternatively, he could take just the opposite approach: He could argue that Fitzgerald simply lacks a cause of action and that no immunity issue is therefore presented.

Accordingly--if my analysis is correct--you might find it necessary, in order to show that Justice White must treat immunity as a constitutional issue under the First Amendment cause of action, to argue that no cause of action can be inferred under the statutes. (You need not do so to reach the immunity issue as presented by the parties--only if you think it expedient to attack the "diversionary" approach adopted last year by Justice White.) Again, depending on Justice White's approach, you might not. Unfortunately, the parties devote little space or energy to analysis of the statutory basis for Fitzgerald's claimed cause of action.

As the briefs are not very helpful, I summarize their arguments only briefly.

A. Arguments of the Petitioners

1. Arguments of the Petitioner Nixon

In essence Nixon advances three arguments. First, he argues that the President has historically been recognized as

immune from civil liability. (The purpose of this argument is to respond to the guidelines of Butz v. Economou, 438 U.S. 478, 508 (1978): "In each case we have undertaken 'a considered inquiry into the immunity historically afforded the relevant official at common law and the interests behind it.'") As evidence he cites historical practice: For nearly 200 years, suits against the President were "exceedingly rare." Brief at 22. The Federalist Papers and the debates at the Constitutional Convention suggest that impeachment was intended as an exclusive remedy. Justice Story, in his Commentaries, spoke explicitly of the President's "official inviolability."

Second, a recognition of absolute Presidential Immunity is "essential for the conduct of the public business." The President is an obvious target for suits by dissatisfied citizens and public employees. The costs of such lawsuits--in time as well as money--would place an unacceptable drain on the presidential office. Discovery is especially burdensome. Against these costs must be weighed the largely inconsequential benefits of allowing the President to be sued for damages. Damages liability adds little to the deterrent effects of impeachment and criminal liability. An array of administrative and judicial remedies exists under Civil Service statutes and the Federal Tort Claims Act. These provide adequate compensation to victims of unlawful action. In this regard, it must be recognized that qualified immunity has proved inadequate to its purpose. It constructs no effective barrier to frivolous pleadings, and it permits ruinous discovery.

+ does indeed

Third, absolute immunity is necessary to protect the integrity of the executive branch. The possibility of civil discovery threatens the confidentiality of presidential communications. As this Court has recognized in cases implicating the Speech or Debate Clause, "judicial oversight" would "realistically threaten to control" the conduct of officials of a coordinate branch. Gravel v. United States, 408 U.S. 606, 617 (1972); see United States v. Helstoski, 442 U.S. 477, 491 (1979) (purpose of privilege is to "preserve the constitutional structure of separate, coequal, and independent branches of government).

2. Defendants Harlow and Butterfield

These defendants offer the argument that Fitzgerald has no cause of action, and that the Court should decide the case on this basis. Fitzgerald seeks to imply a cause of action under two federal statutes and the Constitution.

(a) The First Federal Statute, 5 U.S.C. § 7211. This is a section of the Civil Service Act, which provides that "The right of employees, individually or collectively, to ... furnish information to either House of Congress, or to a committee of Member thereof, may not be interfered with or denied." It expressly provides no right of action. The petitioners advance a variety of reasons why there can be no implied action under this provision. First, this Court established in Davis v. Passman, 442 U.S. 279 (1979), that statutory causes of action would be implied less readily than rights to sue under the Constitution. Second, under a statute,

the dominant question concerns congressional intent. See Texas Industries v. Radcliffe Materials, 451 U.S. ____, ____ (1981). Here, nothing in the legislative history suggests that Congress did intend to create a right of action. Finally, Congress's provision of a panoply of alternative remedies, available through the Civil Service Commission, suggests that it did not intend a judicial remedy. See Transamerica Mortgage Advisers, Inc. v. Lewis, 444 U.S. 11, 19-21 (1979).

(b) The Second Federal Statute, 18 U.S.C. § 1505. This is a criminal statute, which provides penalties for interfering with witnesses before congressional committees and goverment agencies. This Court has been reluctant to imply rights of action from criminal statutes. Here, Fitzgerald is not even a member of the class for whose especial benefit the statute was enacted. Section 1505 was designed to protect the legislative process, not to benefit witnesses. Cf. Odell v. Humbel Oil & Refining Co., 201 F.2d 123 (CA 10), cert denied, 345 U.S. 941 (1953) (plaintiffs suing for employment discharge allegedly caused by grand jury testimony not entitled to any right of action under a related statute, § 1503, because it was enacted for "protection of the public" rather than for the benefit of plaintiffs).

Bivens action

(c) Bivens Action Under the First Amendment. As this Court recently reaffirmed in Carlson v. Green, 446 U.S. 14, 18 (1980), a Bivens action "may be defeated in a particular case when defendants demonstrate 'special factors counselling hesitation in the absence of affirmative action by Congress.'"

In this case at least three such special factors are present. First, there is the special status of the defendants: the President of the United States and his personal advisers. Second, as the Fifth Circuit recently recognized in Bush v. Lucas, 647 F.2d 573, 576 (CA5 1981), affirming on remand 598 F.2d 958 (CA5 1979), the "unique relationship between the Federal Government and its civil service employees is a special consideration which counsels hesitation in inferring a Bivens remedy," because the federal government should be accorded the "widest latitude" in administering its internal affairs. This Court has recognized repeatedly that the role of the Government as an employer toward its employees is fundamentally different from its role as sovereign over private citizens generally. E.g., Sampson v. Murray, 415 U.S. 61, 83 (1974); Arnett v. Kennedy, 416 U.S. 134, 168 (Powell, J., concurring)("Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs"). Third, the availability of an alternative remedial scheme constitutes a special factor counselling hesitation.

On the merits of the immunity question, petitioners argue that the public interest requires recognition of absolute immunity for the President's closest aides. "Again and again the public interest calls for action which may turn out to be founded on a mistake in the face of which an official may later find himself hard put to satisfy a jury of his good faith." Gregoire v. Biddle, 177 F.2d 579, 581 (CA 2 1949), cert denied,

339 U.S. 949 (1950). This insight is confirmed by experience, which has shown that qualified immunity is inadequate to serve its protective purposes. Suits against presidential aides result in discovery of documents requiring confidentiality.

If this Court is unwilling to recognize the absolute immunity of presidential aides, it should at least adopt an application of the immunity doctrine that better conduces to summary disposition of frivolous suits. One possibility was ably stated in Judge Gesell's concurring opinion in Halperin v. Kissinger, supra, 606 F.2d at 1215: "[A] plaintiff should be required to make a stronger showing on the immunity question before being permitted to proceed to trial. I would hold that the plaintiff must establish after the completion of discovery and before trial commences, not merely the existence of a genuine dispute as to some material issue of fact but also, by the preponderance of the evidence or through clear and convincing evidence, that the official failed to act with subjective or objective good faith."

Finally, petitioners argue that their actions concerning Fitzgerald all occurred "within the outer perimeters of their line of duty." Barr v. Matteo, 360 U.S. 564, 575 (1959). Accordingly, they are entitled to claim the full immunity attaching to their offices.

C. Arguments of the Respondent Fitzgerald

Fitzgerald argues that there is neither a constitutional nor a judicial basis adequate to support absolute immunity. The Constitution provides Congress with the Speech or Debate

Clause, but gives no similar shield to the executive branch. The impeachment remedy redresses injuries done to the body politic itself. It was not intended as a substitute for civil remedies. Thus, when Thomas Jefferson was sued for a trespass allegedly occurring while he was President, he invoked a plea much more like qualified that like absolute immunity. He claimed that the act was "done under a law of congress, and in his character of president of the United States, without malice." The suit was ultimately dismissed, not because of immunity, but because it was brought in the wrong district. Livingston v. Jefferson, 15 F. Cas. 660 (CCD Va. 1811) (No. 8,411).

The modern immunity cases clearly establish that "rank" is irrelevant to "immunity." Immunity attaches only to the functions for which it is necessary--the prosecutorial and judicial functions.

And the claim to "derivative immunity," which is asserted by Harlow and Butterfield, is both bizarre and "ahistorical." It would hold "that a Henry Kissinger of a James Schlesinger enjoys an absolute immunity while serving in the White House, but forfeits this immunity when he assumes the greater responsibilities of a Cabinet office."

Absolute immunity is not needed to protect the performance of the presidential office. The White House lawn is not swarming with process servers. In any event, Nixon is a former, not a sitting, President. If any limitation were needed, a limitation of suits against incumbent Presidents

would suffice. Yet the courts have not thought this necessary with regard to injunctive remedies. See, e.g., Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

Nixon argues that absolute immunity is essential to preserve the separation of powers and prevent judicial review of presidential motives, thought processes, and communications. But this is essentially the same argument twice before presented and twice before rejected in Nixon v. Administrator of General Services, 433 U.S. 425, 443 (1977), and United States v. Nixon, 418 U.S. 638, 707 (1974). Moreover, civil damage suits--especially after a President has completed his term of office--are surely far less intrusive than judicial orders commanding of restraining executive action.

Finally, although he asserts that the "implication" question is not properly before the Court, Fitzgerald contends that he does in fact have an implied cause of action under two federal statutes and under the Constitution.

(a) First Statutory Basis, 5 U.S.C. § 7211. This statute creates rights for the benefit of federal employees, a clearly identified class of which Fitzgerald is a member. Congress passed the original version in 1912. Its intent, as expressed then, was "to protect employees against oppression and in the right of free speech and the right to consult their Representatives." Nonetheless, Congress did not provide an administrative remedy at the time it enacted the provision; criminal sanctions were not available until 1940; and there was no express provision for backpay until 1948. It thus seems

clear that Congress meant to create a right of action in 1912, and there is no indication of a subsequent intent to withdraw that right.

(b) The Second Statutory Basis, 18 U.S.C. § 1505. Concentrating mostly on the first statutory claim, Fitzgerald's brief makes little attempt to justify his claim under this criminal statute.

(c) The Bivens Claim Under the First Amendment. Fitzgerald argues that no special factors counsel against a Bivens remedy. Lucas v. Bush, supra, the CA5 case relied on by the petitioners, is distinguishable. Congress had not, as here, expressly prohibited the conduct for which the suit was brought. To the extent that Bush holds personnel decisions too sensitive to be reviewed at all, it is simply wrong. Executive discretion in this area is broad, but it is not unreviewable.

D. Briefs of Amici Forget them

The amici add virtually nothing. The Solicitor General has filed precisely the same brief that the Government submitted a year ago, not even changing the cover.

Briefs in support of the respondent have been filed by a collection of Members of Congress, ranging from Orrin Hatch to Barney Frank; by the Government Accountability Project of the Institute for Policy Studies; and by the Mountain States Legal Foundation.

IV. ANALYSIS

The main difference between this case and last Term's Kissinger case is that this case involves an attempt to "imply"

causes of action under two federal statutes. This could complicate the case in any of several ways, most of which are reflected in what follows.

A. Last Term: The Powell Approaches

Last Term in Kissinger v. Halperin you circulated two "versions" of an "absolute immunity" opinion. Version I assumed the existence of a Bivens cause of action, then held the President entitled to abolute immunity. This approach remains open on the facts of this case. The main difference is that the Court would probably also need to assume--although it would not need to hold--that a statutory cause of action also exists.

Version II would have held that no Bivens action could be implied against the President. His constitutional stature would have counted as a "special factor" counseling hesitation in the absence of affirmative action by Congress. This approach also remains open, but with a caveat. In order to reach the Bivens question, the Court would first probably need to decide that there was no cause of action under either of the statutes. It would seem very, very odd to assume the existence of causes of action under the statutes, then inquire whether there was a cause of action under the Constitution.

B. Last Term: The White Approaches

Justice White also circulated two versions last Term. But his differed less than yours. In both he began with the assumption that Congress had expressly created a cause of action against the President under Title III. His question,

which he then answered in the negative, was whether the Constitution barred the Congress from subjecting the President to damages liability.

This year the question cannot be framed the same way. The statutory cause of action--if it exists at all--must be implied. I am not sure how Justice White may assess the relevance of this difference. If Congress intended to create an implied cause of action, there would presumably be no difference. On the other hand--purely as an evidentiary matter--it may be more than usually significant that Congress failed to create a cause of action expressly. To subject the President to damages liability is a serious matter. If Congress had intended to do so, wouldn't it have said so expressly? I do not know what Justice White would say. Much depends on how one views the President--how different he seems from other executive officers.

At the constitutional level, Justice White took a narrowly "functional" approach to the immunity issue. He argued that immunity attached to the performance of functions, not the offices of persons who performed them, and that good faith immunity adequately protected the wiretapping function. This year he could take a similar approach, so defining the function involved here as not to require absolute immunity.

One other possibility might be worth mentioning. Justice White could conceivably attempt to make the immunity issue disappear altogether, by denying that any cause of action exists at all.

Duck's guess - BRW will imply a cause of action

My guess, however, is that he will find an implied cause of action at least under 5 U.S.C. § 7211, which provides that "The right of employees, individually or collectively, to ... furnish information to either House of Congress, or to a committee member thereof, may not be interfered with or denied."

C. The Powell Approaches Compared: Applications to This Case

To assume a cause of action, proceeding directly to the immunity questions, is an "all or nothing" approach--both constitutionally and tactically. In taking it you would need to hold that Congress cannot, by statute, subject the president to damages liability; and that judges, in construing the constitution, may not do so either. This would be a very strong holding, which you may find attractive. There is also the question whether it could win a Court.

no

A subsidiary approach is possible, but unattractive. The Court could, as a matter of judicial self-restraint, uphold absolute immunity in actions based on the Constitution. At the statutory level, however, it could evade the question whether Congress could knowingly subject a President to damages liability by treating an implied cause of action as one arising under "federal common law." By doing so, it could claim the authority of cases upholding absolute immunity under the common law, e.g., Barr v. Matteo. This approach is unattractive, however, because of your views about implied rights of action--that judges have no common law power to create them, and that the central inquiry concerns congressional intent.

Accordingly, the other plausible approach would be to examine the causes of action individually. The Court could do this--although it did not grant cert on any "cause of action" question--essentially on the theory that the "immunity" question necessarily includes the question: Immunity from suit under what constitutional provision or what statute? This connection is necessary if the Court is not to assume that it must answer the immunity question on the broadest possible constitutional basis--i.e., that absolute immunity is always available to the President, or that it never is. I am sure that some justices would dislike addressing the "cause of action" question without the benefit of a decision by the Court of Appeals.[1] But it should surely be considered, for several

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[1]There are two interconnected bases on which the Court could reach this question. Under Rule 21.1(a), the Court may address any issue "fairly comprised" within the questions presented in the cert petitions. In their petition in 80-945, Harlow and Butterfield raised as their second question: "Whether petitioners, as senior advisers to the President of the United States, should be subjected to trial and the risk of civil damages from a person claiming injury from an adverse personnel decision of a federal executive department?" I think that this question can fairly be said to subsume the question whether there has been a cause of action stated against them. This basis is related to the precedent established by Justice White's opinion in Procunier v. Navarette, 434 U.S. 555, 559-60 n.6 (1978). In that case the Court granted cert on the question whether the respondent had stated a cause of action against prison officials. But it then treated this question as "comprising" the question "whether petitioners knew or should have known that their alleged conduct violated Navarette's constitutional rights." Id. This of course was in order to establish whether there was a factual predicate for a decision of the case on immunity grounds; and it was on this immunity basis that the Court in fact decided in favor the petitioner. Procunier can thus be read as holding that the "immunity" and "cause of action" questions are so intimately related that a decision of one properly entails a decision of the

Footnote continued on next page.

reasons.

(1) With respect to the statutory cause of action, this approach would exploit the fact that the plaintiff seeks to imply his right to sue for damages. The immunity question would be hardest, I think, in a case in Congress had said clearly that the President would be liable in damages. Here Congress has not said this. As I suggested above, I think that silence is powerful in this context. If Congress had intended to make the President liable, would it not have said so?

There are two statutes under which a cause of action could be implied. One is a criminal statute, 18 U.S.C. § 1505. I think it would be easy to reject the implication attempt under this statute. The other is 5 U.S.C. § 7211, which provides that the right to testify before Congress "may not be interfered with." The legislative history is obscure; I intend to do more research. Provisionally, I would have to say that the argument for implication is stronger under this statute.

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other. Finally, if necessary it could (correctly) be argued that Rule 21 is not jurisdictional, and that the Court is free to dispose of a case on any proper basis, especially where necessary to avoid large holdings of constitutional law. The Procunier opinion hinted at this: "In any event, our power to decide is not limited by the precise terms of the question presented. Blonder-Tongue Laboratories, Inc. v. Univeersity Foundation, 402 U.S. 313, 320 n.6." In this connection it appears that the Court's celebrated decision in Erie Railroad v. Tompkins, 304 U.S. 64 (1938), effectively answered a question--i.e., whether prior decisions of the Court should be reversed--that was not presented in the petition. As a final resort, 28 U.S.C. § 1254 establishes the power of this Court to review any aspect of cases "in the courts of appeals."

But there are alternative remedies. And, to repeat myself, the President is the President. In his case, surely, I would think that unusually persuasive evidence of congressional intent would be required.

A problem with this approach, at the statutory level, might arise from the cases of Harlow and Butterfield--with regard to whom the implication question might look different. However, based on the availability of alternatie remedies, I think that you would probably be comfortably in holding that no cause of action could fairly be implied.

(2) Concerning the Bivens action under the Constitution, this approach would allow the Court to rely on "special factors" counselling hesitation. Here there would be two, which seem to me to mesh nicely. The first is the status of the President. The second is the function in which the President, in this case, was acting (if at all)--that of the chief of personnel and organizational structure. It is undisputed that Fitzgerald lost his job pursuant to a reorganization. Structuring the government is a quintessential executive function. Moreover, assuming that it frequently results in people losing their jobs, it is one in which the President is peculiarly vulnerable to suit; it is also--which I think is crucial--one in which the fear of being sued could frequently deter the President from acting independently in the public interest. A plaintiff should not be able to arouse such fear through ingenious pleading that his dismissal constituted retaliation for First Amendment activities.

Again, however, the non-presidential defendants raise inconvenient questions. In which of their functions, if any, should they be entitled to absolute immunity in matters of personnel selection and organization of the government? I would be inclined to answer that, once again, the "special factors" defeat Bivens liability--leaving open the question what liability Congress could impose by statute, if it expressly did so.

D. The Relevance of Peculiar Facts

Whichever your "version" of approach, I think that the main question is how far to rest on the favorable facts of this case--how narrowly to write an opinion. As a matter of constitutional jurisprudence, I would be inclined to put the matter on narrow grounds, hinting perhaps that broader grounds were available but need not be invoked: Congress did not explicitly impose liability on the President and should not be presumed to have done so, at least in this delicate area in which the President (a) is performing the crucial executive function of structuring the government and thereby eliminating employees and (b) could easily be deterred from fearless performance of that function by the threat of civil suits by fired federal employees. These considerations are equally powerful in assessing the question of immunity in a suit arising under the Constitution.

The argument involving the sensitivity of the President's functions relevant to this particular case could be fashioned to fit the approach of either Version I or Version II.

Depending on the breadth of an opinion that would hold a Court, could be extended across a broader range of functions than I have suggested. Alternatively, I suppose it could be used as a kind of examplar to justify absolute immunity for a President in the exercise of all his functions. I do, however, think that some use should be made of it. In my view, Justice White's strongest argument last year was that absolute immunity has traditionally attached to functions, not to offices; and that it has been associated especially closely where fear of liability could influence an official's decision about how to behave. Imbler v. Pachtman is illustrative of both points. The more that an opinion moves to a clearly "functional" view, the better it accords with the tenor of the case law--and thus, in my view, the more powerful the legal analysis.

* what about judges, prosecutors, legislators ?

V. CONCLUSION

I close with an apology for being somewhat unfocused. There are many, many directions that the Court could take. I have been somewhat uncertain which to pursue.

My tentative views:

(1) The Court has jurisdiction to hear this case, though I have prudential doubts--based on the appearance of manipulation--about whether it ought to do so.

(2) Assuming that it exercises its jurisdiction, the Court is free to inquire into Fitzgerald's alleged causes of action--the approach that it would seemingly have to take in order to pursue the analytical approach of last Term's Version II.

(3) The President's functions at issue here can be

characterized in very favorable terms, implicating the fear that civil liability could deter a President from making personnel decisions in the public interest. The more narrowly the "immunity net" is cast, more the opinion comes within the precedential ambit of Imbler v. Pachtman and other cases in which absolute immunity has been upheld. Narrowness would have equal benefits under the "special factors counselling hesitation" inquiry mandated in the Bivens inquiry of the Version II approach.

Nov. 27, 1981

TO: MR. JUSTICE POWELL

FROM: DICK FALLON

RE: Fitzgerald: His Implied Cause of Action

79-1738

Fitzgerald's strongest claim to "imply" a cause of action arises under 5 U.S.C. § 7211 (Supp. III 1979). The section provides that "The right of employees, individually or collectively, to petition Congress or provide information to either House of Congress, or a committee or a Member thereof, shall not be interfered with or denied."

A strong argument can be made that no private cause of action can be implied under this statute.

Section 7211 was adopted in its present form as part of the Civil Service Reform Act of 1978. Prior to 1978, similar language had been included in 5 U.S.C. § 7102. Like § 7102, § 7211 applies only to civil servants, who have the full panoply of civil service remedies available to them. These include administrative review of allegedly improper discharges, with a right of appeal to the courts. There is no indication on the face of the statute that Congress intended to create a private right of action. Fitzgerald admits there are no references to implied rights of action in the legislative history--either of

Section 7211 or of its predecessor statutes. See Brief for Respondent, at 44-45. And the availability of alternative remedies is strong evidence that Congress did not intend to provide the additional remedy of civil damages. See Transamerica Mortgage Advisers, Inc. v. Lewis, 444 U.S. at 1921; Securities Investor Protection Corp. v. Barbour, 421 U.S. 412, 419 (1975). In addition, Congress has provided the deterrent of a criminal statute to protect the employee rights enumerated in the section. See 18 U.S.C. § 1505. Finally, in this case--unlike the Leist case under the Commodity Futures Trading Act--there is apparently no history of judicially implied rights of action.

Upon a reading of the briefs, Fitzgerald's strongest argument seemed to rest on the history of the first statutory predecessor of § 7211, Section 6 of the Post Office Appropriations Act of August 24, 1912, ch. 389, 37 Stat. 539. But his claim dissolves in the legislative history. As Fitzgerald argues, that section was enacted "to protect employees against oppression and in the right of free speech and the right to consult their Representatives." H.R. Rep. No. 388, 62d Cong., 2d Sess. 7 (1912). This protection was thought necessary to override the "gag rules" that had been imposed by executive orders prior to that time. However, while Fitzgerald seems correct that Congress was concerned about the welfare of civil servants, there is no indication in the legislative history that Congress intended the section to create a private right of action for damages.

Section 6 of the 1912 Act was a general provision providing that persons in the classified civil service could not be fired except for cause. It provided for at least a "paper hearing" within the department seeking to dismiss an employee. Beyond that, it required that copies of the records of dismissal cases should be annually reported to Congress. In the floor debate in the House, at least two members suggested that this congressional oversight--not any judicial remedy--would be the bill's principal protective mechanism. Representative Calder stated that "Supervisory officials will hesitate to trump up charges ... as all cases of removals and reductions will be submitted to Congress each year, and if an employee can produce satisfactory evidence that he has not received the protection afforded in this bill his case can be made the subject of a special inquiry of Congress so ddecides." 48 Cong. Rec. 4654. He made no reference to a judicial action. Representative Reilly--the only House member quoted by Fitzgerald--spoke to similar effect: "Men in official position will hesitate to trump up charges against an employee for the purpose of satisfying some ... grudge, as all the cases of removals and reductions will be submitted to Congress each year...." 48 Cong. Rec. 4656. Thus, although the section was intended to protect employees, there is no indication that the protection was to come through an implied right of action.

Indeed, in the historical context it is entirely implausible to think that Congress, in 1912, could have intended to create by mere implication a right to sue for damages from an executive

official performing an official function. Only a relatively few years earlier, in 1896, this Court had held explicitly that executive officials were absolutely immune from civil suits arising from "general matters committed by law to [their] control or supervision." Spalding v. Vilas, 161 U.S. 483, 498 (1986).

The other section from which Fitzgerald would infer a statutory cause of action is a criminal statute, 18 U.S.C. § 1505. It was passed originally in 1940, at a time when civil service employees already enjoyed administrative remedies for improper discharge. Again there is no indication in the legislative history that Congress intended to create a private right of action.

In sum, I think that the argument could be made that Fitzgerald has failed to present a statutory claim on which relief could be afforded. That would leave him only with his constitutional claim--a case in which he could not claim that Congress had meant to impose liability to the full extent permitted by the Constitution. (Justice White invoked this argument in discussing immunity under Title III in last year's Halperin case.)

For now, however, I have no further thoughts on the relative desirability of this line of analysis.

79-1738 NIXON v. FITZGERALD

Argued 11/30/81

Miller (Peter)

Reorg - number of Air Force personnel diminished.

Civil Service proceeding - extended over three years. Seamans testified.

Jan 31 '73 - taped White House conversation Nixon mis-spoke.

In July '78 (ten yrs after event) Penn was sued

Limitation of liability act - May 1980 & filed in this Court shortly thereafter

Richardson (Butterfield & Harlow)

Q. whether senior officials have absolute immunity.

Butterfield was on White House staff. } Chief of Staff

The Peter had no part in abolishing Rep's job.

~~Exact~~ Actions must be ~~outside of~~ within the "outer limits" of their authority. Barr v Mateo

As a jail break pleadings, Counsel suggest a high standard of proof be placed on Pls (e.g. clear & convincing ev).

Brown suggested "objective standard"

Nolan (Resp)

Reduction in "force" was a "sham"

While Home taper & Press Conference statements by Nixon are "heart of his case. This was ~~for~~ action beyond scope of his authority. Pres has no auth to fire a Defense Dept employee. Fitzgerald had a legislatively protected position. DC so formed as to Pres a cover as to Sec of Defense.

(Responding to BRW's Q, Nolan conceded Pres. could fire Sec of Defense unless he relieved Fitzgerald. Responding to JPS, Nolan also conceded that Pres would have auth. to act in a Reduction of Force scope - as claimed by Reton in his case)

The core issue presented by this case is "absolute immunity".

Nixon case is not moot.

Issue of Pres. immunity, including derivative immunity, are here.

1505
7211

~~Exclusive~~ remedies

Nolan (

No derivative immunity for aides if Pres acted beyond scope of his authority.

Remedies of ~~reinstatement~~ reemployment & back-pay are insufficient - should receive punitive damages also.

JPS asked what "uncompensated wrongs" is being claimed? (Nolan gave no clear answer)

Dec. 1, 1981

TO: MR. JUSTICE POWELL

FROM: DICK FALLON

RE: Dates of the Nixon-Fitzgerald Agreement

Yesterday we spoke about the date of the settlement agreement in the context of other relevant dates in the Kissinger and Fitzgerald cases.

Nixon and Fitzgerald claim to have reached the agreement in the early hours of the morning of May 19, 1980. That is the date on which this Court granted the petition in No. 79-880, Kissinger v. Halperin. Nixon had previously filed his petition for cert on May 2, 1980. Cert was not granted, however, until over a year later, on June 22, 1981--the same date on which the Kissinger decision was announced.

Nixon and Fitzgerald have made two claims about the timing of their actions that may or may not be crucial to the propriety of their behavior.

(1) They claim to have reached their agreement before this Court granted Kissinger. This claim cannot be substantiated by the record, aside from the testimony of the parties. That testimony is that they reached their agreement some hours before the Order List was released on May 19, 1980. I am unclear that

this question makes any difference, either practical or ethical, to the outcome of the case. However, if Nixon knew that Kissinger would be granted, he might have assumed that the immunity issue would almost surely be decided in that case. If so, he might have expected his settlement agreement with Fitzgerald to be dispositive, on the assumption that there would be no reason for this Court grant Fitzgerald as well. If he meant to preserve the case as a "backup" in the event of a Kissinger deadlock, this intent might be relevant to the claims that the case was "feigned" or "collusive" in the sense of being preserved at all only to get a decision of the immunity issue.

(2) Nixon and Fitzgerald claim to have filed notice of their agreement in this Court on either June 10, 1980. Although the Docket Sheet kept by the Clerk fails to record any such filing, a search of the files--conducted since our conversation--reveals that the statement was in fact filed. For reasons that remain unclear, however, it was not circulated. It thus appears that the Court was not aware of it at the time it voted to grant the case.

No. 79-1738, Nixon v. Fitzgerald Conf. 12/2/81

The Chief Justice Reverse

There is a live case or controversy. E

On merits, no private right of action under either statute.

Civil Service Comm. found no illegal motive but ordered reinstatement.

No Bivens cause of action. Agree with LFP's memo last Term. Special factors: office of President & other remedies.

Pres. also has absolute immunity - for reasons stated in LFP's memo.

[Read quotes from Gravel re the burden on Fed officials]

Justice Brennan D/G Nixon & Aff other two.

Implied causes of action are not before us.

As to Nixon, this is a "sleazy" performance. The statement filed here is false. Counsel were deceitful.

On merits, would aff.

See note in Second Conference 12/14

Justice White Reverse re cause of action issue.

Does not agree with WJB. There is a real controversy. Can't say Barrett Brettingham & Miller acted unethically.

On cause of action, they are semi-junior. We can reach them.

Doubtful whether a Fed employee has a Bivens remedy. Inclined to hold no action.

There are plenty of other remedies.

Can join Reversal of both cases on "no private cause of action"

But views as to immunity have not changed since last Term.

Byron will not go all way in saying merely a Bivens action vs President, but appears more there.

Justice Marshall DIG - agree with WJB.

No absolute immunity for Prosecutor in his advisory.

Justice Blackmun DIG both cases.

Case ~~stands~~ "sticks" but not moot.

Then in a "feigned law suit". Counsel misled court.

No absolute immunity for any of Cause of action issues are not here.

Justice Powell Reverse

There is a case or controversy. Case is here.

See my notes.

Justice Rehnquist Reverse on basis of my memo last Term

Imply no Bivens cause of action.

Pres. has absolute immunity.

Not sure we should reach cause of action issue, but could join 4 to make a case.

Agree with my memo last Term as to Bivens.

Could rely on Bell v Hewell

Justice Stevens Reverse

Bush v Lucas (CA5) is good precedent.

Would agree there is no private cause of action vs President.

As to views of WJB, TM & HAB, Hunter they are wrong. Nothing wrong with lawyers attempting to limit liability. Also, a lawyer may try to litigate a favorable issue.

Cause of action is semi-juris.

Justice O'Connor

Not finally at rest.

Can't reach private cause of action. ?

If we could reach it, there is no private cause of action vs all of them.

Never a private cause of action vs Pres. Also Pres. is absolutely immune.

79-1705 Nixon v. Fitzgerald 12/2

1. Collateral Order doctrine - properly here.

2. Tentative position (32)

Resp. asserts cause of action under Const. (1st Amend - Bivens), + two statutes
18 USC 1505 (criminal statute
5 USC 7211 (right to testify before Congress "may not be interfered with" (33)

(a) Address the "cause of action" issue.

(i) Not presented as a Q, but to reach immunity issue, we must ask: What Const. provision & what statute?

(i) My Bivens draft applies to 1st Amend.

(ii) ~~Text~~ No damage remedy may be implied from either statute.

Here re ~~summary~~ "collateral order" doctrine - 16. Thus can reach immunity issue w/o deciding whether there is a "cause of action" - 16

? Godfrey 3

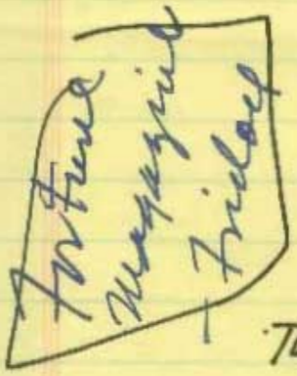
Even if no Bivens action, ~~the~~ Π claims implied causes under two statutes - 18

Differences from Kennedy:

1. No statute that arguably creates an express c/action vs Pres. - 19

We could by-pass implied cause of action - as Cert. Pet. presented no Q. Thus we can reach immunity issue w/o addressing c/action 19

→



My position last Term - 29

What I could do here - 31

Exp - p 32

The two statutes - 33

Last job in a wrong. of Debt - 34

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December 2, 1981

Honorable Alexander L. Stevas
Clerk of the United States
Supreme Court
1 First Street, N.E.
Washington, D.C. 20543

Re: Richard Nixon v. A. Ernest Fitzgerald, No. 79-1738; Harlow and Butterfield v. Fitzgerald, No. 80-945

Dear Mr. Stevas:

This letter is submitted to clarify a response which I gave on Monday, November 30, to a question from Justice O'Connor during oral argument in the above-referenced case. I had intended to offer this clarification during my rebuttal, but did not have a rebuttal opportunity.

Justice O'Connor inquired whether, under the liability limitation agreement between Mr. Nixon and Mr. Fitzgerald, there would be any adjudication of the facts in the court below following the decision in this Court. My reply was that there would not be any further adjudication of the facts. I meant, thereby, that there would be no trial on the merits of the respondent's complaint irrespective of how the Court decides the case. However, the agreement does contemplate further proceedings below, including such additional adjudication of facts and the application of the law to the facts as are appropriate in light of this Court's decision. For example, were this Court to issue an opinion setting forth the standard for determining whether a President's actions are within the outer perimeter of his duties, this could require the district court, on remand,

to determine either that the record as it now stands establishes that Mr. Nixon's actions satisfied or failed to satisfy that standard, or that the evidence adduced thus far is in dispute and that a trial is required to resolve the factual issue. The effect of the agreement's limitation is that any such further adjudication of facts must be based upon the existing record. In other words, if any factual issues remain outstanding following this Court's decision, and such issues cannot be resolved on the current state of the voluminous record (thereby necessitating either additional discovery or a trial), Mr. Nixon's obligation to pay $28,000 ripens. Such payment will be accepted by the respondent in lieu of added liability, and the case will be dismissed.

I am providing sufficient copies of this letter for distribution to the Court and request that you make that distribution.

Very truly yours,

Herbert J. Miller, Jr.

cc: John E. Nolan, Jr., Esq.
Elliot L. Richardson, Esq.
Rex E. Lee, Esquire
William H. Mellor, III, Esq.
Louis Allan Clark, Esquire
John C. Armor, Esquire
Thomas J. Madden, Esquire

1. Cause of action (Bivens) is fairly subsumed under Q's presented (esp. in Butterfield & Harlow Pet. (#4)

2. Case is here under 28 USC § 1254 - we have juris.

3. Proper to reach to avoid Court. issue of ~~or~~ immunity under Separation of Powers

Dec. 4, 1981

TO: MR. JUSTICE POWELL

FROM: DICK FALLON

RE: Nos. 79-1738 and 80-945

Jurisdiction Over Fitzgerald's "Implied Causes of Action"

In his suits against Nixon and Harlow and Butterfield, Fitzgerald claims causes of action under two federal statutes and the First Amendment. In the briefs and again in oral argument, the question has arisen whether the Court ought to examine the bases for Fitzgerald's claim to possess "implied rights of action."

There are really two questions:

(1) Does the Court have jurisdiction to reach the "implication" question if it should, for prudential reasons, wish to do so?

(2) Could the Court reach the implication consistently with its own rules?

The Court's Statutory Jurisdiction

There is no jurisdictional bar to this Court's reaching the implication question if it wishes to do so. Fitzgerald's counsel conceded this at oral argument. See Transcript at 55-56:

QUESTION: You are not claiming we don't have jurisdiction [to consider the implication question]?

MR. NOLAN: No, absolutely not. Absolutely not.

QUESTION: And if we should entertain it, it would, would it not, avoid the decision of a constitutional question? .... If we decided it one way?

MR. NOLAN: Yes. I mean, it arguably could do that.

Mr. Nolan had no choice but to make this concession. The Court granted cert in this case pursuant to 28 U.S.C. § 1254. This is a jurisdictional statute, which provides for review by this Court of "cases"--not "questions"--in the courts of appeals.

As a matter of self-regulation, the Court has established by rule that it will generally limit its review to "the questions set forth in the petition or fairly comprised therein." Rule 21.1(a). But the Rule "does not limit our power to decide important questions not raised by the parties." Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 320 n. 6 (1971). The Court has held repeatedly that it may "in exceptional cases" review an issue not raised below or in the petition for certiorari. Duignan v. United States, 274 U.S. 195, 200; Youakim v. Miller, 425 U.S. 231, 234.

Among those cases the Court has considered "exceptional," one category consists of cases in which the Court has considered issues outside the petition in order to avoid decision of braod

constitutional issues. See, e.g., Boynton v. Virginia, 364 U.S. 454, 457 (1960) (case should be decided, "if it can," on statutory rather than "broad consitutional basis; under the circumstances it was "appropriate" to consider issues not raised in cert petition); Fry v. United States, 421 U.S. 542, 545 (1975) (Court decided statutory issue raised only in amicus briefs "rather than decide a constitutional question when there may be doubt whether there is any statutory basis for it").

This case falls squarely within this "exceptional" category. If Congress had enacted a statute specifically imposing liability on the President, the "immunity" question would be presented in the broadest constitutional terms: Does it lie within the constitutional power of Congress deliberately to subject the President to liability in a private action for damages? Here, if there is no statutory or First Amendment cause of action, the broad constitutional issue is avoided.

Justice White has also argued that the "implication" issue is "quasi-jurisdictional." It is clearly established that this Court is always free to consider jurisdictional issues, whenever raised. See, e.g., United States v. Storer Broadcasting Co., 351 U.S. 193, 197 ( ); Gutierez v. Waterman S.S. Co., 373 U.S. 206, 209 (1963). Gutierez is analogous to this case in several ways. The question there was whether the case actually lay within the admiralty jurisdiction of the federal courts. Although "purely" jurisdictional in one sense, this was essentially a question whether the court could award relief under statute pleaded as the basis for the cause of action. This case

involves a similar question: whether the plaintiff has stated a claim on which relief could be granted.

Consistency with Court Rules

There is also an argument that the "cause of action" question could be treated as "fairly comprised" within the questions presented in the cert petition filed by Harlow and Butterfield. In their petition they raised as their second question: "Whether petitioners, as senior advisers to the President of the United States, should be subjected to trial and civil damages from a person claiming injury from an adverse personnel decision of a federal executive department?" This question arguably subsumes the question whether there has been a cause of action stated against them. There is strong support in Justice White's Court opinion in Procunier v. Navarette, 434 U.S. 555, 559-560 n.6 (1978). In that case the Court granted cert on the question whether the respondent had stated a cause of action against the petitioner prison officials. But the Court then treated this question as "comprising" the question "whether petitioners knew or should have known that their alleged conduct violated Navarette's constitutional rights." Id. This of course was in order to establish whether there was a factual predicate for deciding the case on immunity grounds--the basis on which the Court in fact held for the petitioners.

Procunier can be read as holding that the "immunity" and "cause of action" questions are so intimately related that one "fairly comprises" the other. To establish whether "there is a cause of action," the Court must know "a cause of action against

whom"?--a question that obviously entials the question of immunity. Conversely, to know whether an official can be "subjected to trial and civil damages," it is necessary to answer the question, "trial and civil damages under what statute of constitutional provision"? On this reading of Procunier, the cause of action question is squarely before the Court because "fairly comprised" within the second question in their cert petition.

Summary

To summarize:

1. The Court has clear jurisdiction to address the "cause of action" question.

2. A plausible argument can be made that the "cause of action" question is present within the meaning of Rule 21.1(c), because "fairly comprised" within the second question presented by Harlow and Butterfield.

3. Even if the "cause of action" question is not "fairly comprised" with the questions presented, it falls within an established category of exception to Rule 21--a category of cases in which the Court has entertained questions not presented in order to avoid unnecessary decisions of large questions of constitutional law.

Nixon v Fitzgerald 12/13

(to use at 2nd Conference)

I If We do have juris to reach implied cause of action issue

No juris. bar

Fitzgerald's lawyer conceded

Case is here under 28 USC 1254 - general juris statute authorizing review of "cases" - not questions

II Rule 21.1(a) - rule of self-reg. does not limit our power. So held in Bowles-Tongue (402 U.S.) & other cases.

III Prudential reason - avoid Const. decisions re immunities

IV No implied action vs Pres either under statute or 1st Amend

2nd Conference 12/14/81

79-1738 Nixon ~~Butterfield Harlow~~

C.J. - Absolute immunity - 1st choice.
Bivens is 2nd Absolute immunity for all three.

W & B - As to Nixon, no change (took no part in discussion)

BRW - No Bivens cause of action in any of these cases.

T.M. - With Bryan (?) ?! (not with LFP)
(Not sure TM understands BRW)

HAB - no change (said nothing else)

WHR - Agrees D may justly be sub-sumed, but not completely at rest whether we should create implied cause of action.
Prefers absolute immunity.
for all three.

J.P.S. - There is genius to address Bivens, & favors doing this for all three
Stll with LFP.

Sandra - Will go along on implied cause of action, if can be satisfied issue is here.
Absolute immunity for Pres.
Implied immunity for others.

LFP - Same vote as on 12/4.
I made same speech again - with emphasis on our genius

No. 79-1738, Nixon v. Fitzgerald Conf. 12/14/81

Second Conference on this case.

The Chief Justice Reverse

Absolute immunity - 1st choice.

Bivens is 2nd. Absolute immunity for all three.

Except for my summary of my views, I take notes at the Conference discussion of this case on a yellow pad. They were typed herein following the Conference. LFP.

Justice Brennan DIG

As to Nixon, no change (took no part in discussion)

Justice White Reverse

No Bivens cause of action in any of these cases.

Justice Marshall Reverse

With Byron (?) (Not with LFP)

(not sure TM understands BRW's position)

Justice Blackmun DIG

No change (said nothing else).

Justice Powell Reverse

See my yellow notes used at Dec 2nd Conference.
Further study confirms we may reach the
implied cause of action issue (Bivens). See memo.
Also proper to reach it first — as this
would avoid a Const decision on absolute
immunity — tho I would hold there is.
See Dec 2nd (yellow notes) for reasons

Suit asserts claims under two statutes:
(1) Criminal statute, 4(2) right to testify. Also 1st amend
Would not imply under either.

Justice Rehnquist Reverse

Agree Bivens question may fairly be subsumed, but not at rest whether we should reach it. Prefer absolute immunity for all three.

Justice Stevens Reverse

There is jurisdiction to address Bivens and favors doing this for all three. Still with LFP.

Justice O'Connor Reverse

Will go along on implied cause of action if can be satisfied it is proper to reach it.

Absolute immunity for President, but only implied immunity for others.

Supreme Court of the United States
Washington, D. C. 20543

file

CHAMBERS OF
THE CHIEF JUSTICE

PERSONAL

December 14, 1981

Re: No. 79-1738 - Nixon v. Fitzgerald
80-945 - Harlow v. Fitzgerald

Dear Lewis:

Today's Conference generally confirmed the discussion and votes on the above. Unlike you, I regard the issue of absolute immunity as the threshold question. I would not reach Bivens first for there is nothing to "reach," and no lawsuit at all, if there is absolute immunity. Before the Tort Claims Act in 1946, for example, a Court would not inquire into "standing" of a plaintiff in a suit for negligence by the government. There was no liability, no lawsuit in which to have standing.

In this setting the assignment is made to you but I feel obligated to state that my view is irrevocble on absolute immunity. I believe at least Bill Rehnquist and Sandra stated that view at Conference.

I am still unable to understand why we should "duck" that issue when the votes are there. Byron can concur in the judgment on Bivens grounds. Put "hard," your choice is my vote or Byron's! Among other things you have a mild (!) headstart, given the 5-6 inches of memo, chiefly compiled by you and Byron. All of that exploratory development has been valuable. I will at least support your judgment. !

Regards,

WEB

Justice Powell

He has the votes!

LEE DEC 14/15 1981

Nix in File

I used these notes
– to no avail – in
trying to persuade
Nix CJ + WHR to go
with "no course of action"

Collateral Order

Dec 14/15 1981

Nixon: The final vote

DIG	Prefer Bivens	Prefer Immunity
WJB	BRW	CJ
HAB	TM	WHR
	LFP	SOC
	JPS	

~~The~~ Disadvantages of Immunity basis: even if ~~I~~ John & I would join it.

1. BRW & TM will then not decide case on Bivens analysis. ~~Bury~~ Byron said (my notes): "If we reach Immunity issue, will affirm"

Thus, the vote ~~on~~ on Nixon would be 5-4 - with ~~a~~ each of the five having been appointed by Republicans

2. On Bivens issue, the vote to Reverse would be 7 to 2

3. If we do not reach Bivens issue in Nixon, we cannot reach it in Harlow/Butterfield.

~~On~~ There are only two votes for absolute immunity. ~~four~~ Thus we would affirm - & they will go to trial on qualified immunity

LFP/vde

December 16, 1981

Not Sent
See my letter to CJ 01/12/17.

79-1738 Nixon v. Fitzgerald and 80-945 Harlow v. Fitzgerald

I gave a copy of this Draft to John Stevens, and after a full discussion he agreed - subject to one reservation - to join an opinion holding absolute

Dear Chief:

Thank you for your letter of December 14, that reached me late yesterday. I respect, of course, your view that immunity for a President absolute immunity is the threshhold question. As you say, if there is absolute immunity a suit is aborted at the outset. It can be said with equal, if not greater, logic that if there is no cause of action one never reaches the immunity question.

A somewhat stronger reason for going the "immunity" route is that these cases are here on the collateral order doctrine. This is the concern of Bill Rehnquist and Sandra. Yet, for reasons stated by Byron, John and me, we have jurisdiction to reach the cause of action question ("Bivens") and this continues to be my preferred resolution of these cases.

I state at the outset, however, that the importance of the cases - and the involvement of a highly controversal president - make it imperative that we endeavor to have a Court opinion, as well as as many votes for the judgment as can be mustered. The following "chart" shows the votes at Monday's Conference:

DIGG	PREFER "BIVENS"	PREFER IMMUNITY
WJB	BRW	CJ
HAB	TM	WHR
	LFP	SO'C
	JPS	

Addressing now what perhaps can be called prudential reasons for preferring Bivens, I cite the following:

There could be seven votes for a Bivens resolution of both of these cases. You, WHR and SO'C, though preferring immunity, also agree with JPS and me on Bivens. Byron, however, will write his Bivens analysis narrowly, based primarily on the fact that this case involves the relationship of employer - employee in the government service. Thurgood said he would join Byron on this analysis. I would write Bivens broadly, as I did last spring, but would leave open whether a president could be sued for damages if the congress specifically authorized suit. You have agreed in our discussions that the likelihood of such a statute being adopted over a presidential veto is remote.

In sum, we would have seven votes for a Bivens disposition, although two of the votes would be for the judgment only. Nevertheless, there are distinct advantages in having a solid Court for the judgment in the Nixon case.

Again at the prudential level, we must look also to the effect of the way Nixon is written on Harlow. That case presents precisely the same options: a holding of no implied cause of action (Bivens) or a resolution on the immunity issue.

If we were to reach the immunity issue in Nixon on the ground that Bivens is not here, we would be compelled to do likewise in Harlow. The result would be - if the votes remain as stated at Monday's Conference - seven for qualified immunity only, resulting in affirmance. You and WHR alone would find absolute immunity. I feel bound generally by Scheuer and Butz, and this was the position I

took last Term with respect to Halderman in the Kissinger case. If, however, we decided Harlow on Bivens analysis there would be seven votes for reversal.

Thus, if we all were to remain with our "first choice" votes the division in Nixon would be as follows: Three votes for absolute immunity (CJ, WHR and SOC); two votes for a broad Bivens disposition (LFP, JPS); two votes for a narrow Bivens disposition (BRW, TM); and WJB and HAB to DIG. There would be no Court opinion, but seven votes for reversal. If, however, John and I were to defer to your views, there would be a Court of five votes for reversal on absolute immunity. Byron has said he then would not reach the Bivens issue and he and Thurgood would dissent on immunity. This would leave only five votes for the judgment of reversal.

Neither of these "line-ups" is attractive. A good deal can be said, particularly in a case involving Nixon's

personal liability, for seven votes on the judgment (Bivens). But we would then have a badly fractionated Court - a result that none of us would welcome. Indeed, we have - in this case particularly - a strong institutional reason for avoiding fractionalization. I therefore am inclined reluctantly, and subject to talking to John, to defer to your view. On balance, I think it may be preferable in Nixon to have a Court opinion than to end up with seven votes for a judgment with no more than three votes for any single rationale.

Sincerely,

The Chief Justice

cc - Justice Stevens

December 16, 1981

79-1738 Nixon v. Fitzgerald and 80-945 Harlow v. Fitzgerald

Dear Chief:

Thank you for your letter of December 14, that reached me late yesterday. I respect, of course, your view that absolute immunity is the threshhold question. As you say, if there is absolute immunity a suit is aborted at the outset. It can be said with equal, if not greater, logic that if there is no cause of action one never reaches the immunity question.

A somewhat stronger reason for going the "immunity" route is that these cases are here on the collateral order doctrine. This is the concern of Bill Rehnquist and Sandra. Yet, for reasons stated by Byron, John and me, we have jurisdiction to reach the cause of action question ("Bivens") and this continues to be my preferred resolution of these cases.

I state at the outset, however, that the importance of the cases - and the involvement of a highly controversal president - make it imperative that we endeavor to have a Court opinion, as well as as many votes for the judgment as can be mustered. The following "chart" shows the votes at Monday's Conference:

DIGG	PREFER "BIVENS"	PREFER IMMUNITY
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	JPS	

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There could be seven votes for a Bivens resolution of both of these cases. You, WHR and SO'C, though preferring immunity, also agree with JPS and me on Bivens. Byron, however, will write his Bivens analysis narrowly, based primarily on the fact that this case involves the relationship of employer - employee in the government service. Thurgood said he would join Byron on this analysis. I would write Bivens broadly, as I did last spring, but would leave open whether a president could be sued for damages if the congress specifically authorized suit. You have agreed in our discussions that the likelihood of such a statute being adopted over a presidential veto is remote.

In sum, we would have seven votes for a Bivens disposition, although two of the votes would be for the judgment only. Nevertheless, there are distinct advantages in having a solid Court for the judgment in the Nixon case.

Again at the prudential level, we must look also to the effect of the way Nixon is written on Harlow. That case presents precisely the same options: a holding of no implied cause of action (Bivens) or a resolution on the immunity issue.

If we were to reach the immunity issue in Nixon on the ground that Bivens is not here, we would be compelled to do likewise in Harlow. The result would be - if the votes remain as stated at Monday's Conference - seven for qualified immunity only, resulting in affirmance. You and WHR alone would find absolute immunity. I feel bound generally by Scherer and Butz, and more particularly by our affirmance last Term of

qualified immunity for Halderman in the Kissinger case. If, however, we decided Harlow on Bivens analysis there would be seven votes for reversal.

Thus, ~~In sum,~~ if we all were to remain with our "first choice" votes the division in Nixon would be as follows: Three votes for absolute immunity (CJ, WHR and SOC); two votes for a broad Bivens disposition (LFP, JPS); two votes for a narrow Bivens disposition (BRW, TM); and WJB and HAB to DIG. There would be no Court opinion, but seven votes for reversal. If, however, John and I were to defer to your views, there would be a Court of five votes for reversal on absolute immunity. Byron has said he then would not reach the Bivens issue and he and Thurgood would dissent on immunity. This would leave only five votes for the judgment of reversal.

Neither of these "line-ups" is attractive. A good deal can be said, particularly in a case involving Nixon's

personal liability, for seven votes on the judgment (Bivens). But we ~~will~~ would then have a badly fractionated Court - a result that none of us would welcome. Indeed, we have - in this case particularly - a strong institutional reason for avoiding fractionalization. I therefore am inclined reluctantly, and subject to talking to John, to defer to ~~you~~ your views, if you persuade me to do so. On balance, I think it may be ~~best~~ to have a Court opinion than seven votes for a judgment with no more than to end up with three votes for any single rationale.

Sincerely,

The Chief Justice

cc - Justice Stevens

December 16, 1981

79-1738 Nixon v. Fitzgerald and 80-945 Harlow v. Fitzgerald

Dear Chief:

Thank you for your letter of December 14, that reached me late yesterday. I respect, of course, your view that absolute immunity is the threshhold question. As you say, if there is absolute immunity a suit is aborted at the outset. It can be said with equal ~~logic~~, if not greater, logic ~~, as I view it,~~ ~~superior logic~~, that if there is no cause of action one ~~need not consider~~ never reaches the immunity question.

A somewhat stronger reason for going the "immunity" route is that these cases are here on the collateral order doctrine, ~~with cert granted on the immunity issue~~. This is the concern of Bill Rehnquist and Sandra. Yet, for reasons stated by Byron, John and me, we have jurisdiction to reach the cause of action question ("Bivens") and ~~for the reasons~~ ~~I will now summarize~~ their continues to be my preferred ~~I continue to prefer this~~ resolution of these cases.

I stated at the outset, however, that the importance of the cases - and the involvement of a highly controversal president - make it imperative that we ~~make every effort~~ endeavor to have a Court opinion, as well as as many votes for the judgment as can be mustered. The following "chart" shows the votes at Monday's Conference:

DIGG	PREFER "BIVENS"	PREFER IMMUNITY
WJB	BRW	CJ
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double space

OK
p. 3

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1. There could be seven votes for a Bivens resolution of both of these cases. You, WHR and SO'C, though preferring immunity, also agree with me on Bivens. Byron IPS and, however, will write his Bivens analysis narrowly, based primarily on the fact that this case involves the relationship of employer - employee in the government service. Thurgood said repeatedly at Monday's Conference that he would join Byron on this analysis. I would write Bivens broadly, as I did last spring but would leave open whether a president could be sued for damages if the congress specifically authorized suit. You have agreed in our discussions that the

likelihood of such a statute being adopted over a presidential veto is remote.

In sum, we would have seven votes for a Bivens disposition, although two of the votes would be for the judgment only. Nevertheless, there are distinct advantages in having a solid Court for the judgment in the Nixon case.

2. Again at the prudential level, we must look also to the effect of the way Nixon is written on Harlow. That case presents precisely the same options: a holding of no implied cause of action (Bivens) or a resolution on the immunity issue.

If we were to reach the immunity issue in Nixon on the ground that Bivens is not here, we would be compelled to do likewise in Harlow. The result would be - if the votes

remain as stated at Monday's Conference - seven for qualified immunity only. You and WHR alone would find absolute immunity. I feel bound generally by Scherer and Butz, and more particularly by our affirmance last Term of qualified immunity for Halderman in the Kissinger case.

If, however, we decided Harlow on Bivens analysis ~~again~~, there would be ~~a strong majority~~ seven votes for reversal. When I use the term "prudential" in this connection, I am thinking only of the desirability of mustering strong majorities in two cases that are certain to attract ~~enormous~~ public interest and scrutiny. Believing, as I do, that there is no cause of action against any one of these three petitioners, I also would like to end the litigation as to all three of them. If we go the immunity route, Harlow and Butterfield will have to undergo a trial on remand.

rider

* * *

In sum, if we all were to remain with our "first choice" votes the division in ~~these cases, depending~~ Nixon on ~~which theory the five of us in the majority adopt~~ would be as follows: Three votes for absolute immunity (CJ, WHR and SOC); two votes for a broad Bivens disposition (LFP, JPS); two votes for a narrow Bivens disposition (BRW, TM); and WJB and HAB to DIGG. There would be no Court opinion, but seven votes for reversal, however,

An ~~alternative that I will discuss with John is that we~~ If John and I were to defer to your views, ~~and make~~ there would be a Court of five votes for reversal on absolute immunity. ~~My~~ understanding is that if we should do ~~this~~ Byron ~~also~~ has said he would not reach the Bivens issue and he and Thurgood would dissent on immunity. This would leave only five votes for the judgment of reversal.

Neither of these "line-ups" is attractive. ~~ideal.~~ A good deal can be said, particularly in a case involving Nixon's personal liability, for seven votes on the judgment (Bivens). But unless ~~you, WHR, JPS, SOC and I get together on one of these~~ approaches, we would have a badly fractionated Court - a result that none of us would welcome. Indeed, we have - in this case particularly - a strong institutional reason for avoiding fractionalization. I therefore am inclined reluctantly, and subject to talking to John, to defer to you. On balance, I think it may be best to have a court opinion than seven votes for a judgment with no more than three votes for any single rationale.

Sincerely,

cc Justice Stevens

Last Version

LFP/vde

December 16, 1981

79-1738 Nixon v. Fitzgerald and 80-945 Harlow v. Fitzgerald

Dear Chief:

Thank you for your letter of December 14, that reached me late yesterday. I respect, of course, your view that absolute immunity is the threshhold question. As you say, if there is absolute immunity a suit is aborted at the outset. It can be said with equal, if not greater, logic that if there is no cause of action one never reaches the immunity question.

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I state at the outset, however, that the importance of the cases - and the involvement of a highly controversal president - make it imperative that we endeavor to have a Court opinion, as well as as many votes for the judgment as can be mustered. The following "chart" shows the votes at Monday's Conference:

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took last Term with respect to Halderman in the Kissinger case. If, however, we decided Harlow on Bivens analysis there would be seven votes for reversal.

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Neither of these "line-ups" is attractive. A good deal can be said, particularly in a case involving Nixon's

personal liability, for seven votes on the judgment (Bivens). But we would then have a badly fractionated Court - a result that none of us would welcome. Indeed, we have - in this case particularly - a strong institutional reason for avoiding fractionalization. I therefore am inclined reluctantly, and subject to talking to John, to defer to your view. On balance, I think it may be preferable in Nixon to have a Court opinion than to end up with seven votes for a judgment with no more than three votes for any single rationale.

Sincerely,

The Chief Justice

cc - Justice Stevens

In sum, we would have seven votes for a Bivens disposition, although two of the votes would be for the judgment only. Nevertheless, there are distinct advantages in having a solid Court for the judgment in the Nixon case.

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Neither of these "line-ups" is attractive. A good deal can be said, particularly in a case involving Nixon's

lfp/ss 12/17/81 NIXON1 SALLY-POW

78-1738 Nixon v. Fitzgerald

80-945 Harlow v. Fitzgerald

Dear Chief:

My understanding is that you, Bill Rehnquist and Sandra continue to entertain serious doubt as to whether you would join a disposition of the Nixon case on the cause of action question (referred to, for brevity, as the Bivens question). You view is that we took this case in a "collateral issue" context to decide the immunity question, and the three of you continue to have serious reservations as to whether we properly may dispose of the case on a ground neither assigned not submitted to us under the specified question, in the petition or in the briefs.

Bill Brennan and Harry would DIG the Nixon case. Byron and Thurgood would dispose of it narrowly as a case in which no private cause of action could be implied, limiting the analysis to the context of the special relationship of government employment. John and I preferred to address the cause of action question broadly,

holding as my Version II memorandum of last spring was written, on the ground that at least in the absence of specific congressional authorization no cause of action could be implied against the President of the United States.

Thus, it is evident that there may be no Court opinion if each of us remains with our first preference votes. As I view the Nixon case as uniquely requiring a Court opinion, I am now prepared to defer to the wishes of you, Bill Rehqnuist and Sandra and prepare a draft opinion holding that a President has absolute immunity from damage suit liability for the reasons stated at some length in my Version I memorandum last spring. John and you both joined that memorandum. I have discussed the sitaution with John, and subject to a possible qualification as to a reservation that would not prevent a Court opinion, John also is willing to decide the Nixon case on absolute immunity.

I am not entirely at rest as to how to write the Harlow/Butterfield case. The private cause of action issue, though not a question specifically presented in the

petition, was stated as a question in their brief and was argued. Moreover, if we reach the immunity issue in the Harlow/Butterfield case, the decision would be for qualified immunity only. As there is a Court to dispose of this case finally on the absence of an implied cause of action, it would be unfortunate to remand it for trial on implied immunity. _____

but there is certainly greater reason here than in Nixon

Full

lfp/ss 12/17/81 NIXON1 SALLY-POW

78-1738 Nixon v. Fitzgerald

This draft was approved by JPS, and the last ¶ slightly revised before sending it to C.J. & the Conference.

Dear Chief:

My understanding is that you, Bill Rehnquist and Sandra continue to entertain serious doubt as to whether you would join a disposition of the Nixon case on the cause of action question (sometimes referred to, for brevity, as the Bivens question). Your view is that we took this case in a "collateral issue" context to decide the immunity question, and the three of you continue to have serious reservations as to whether we properly may dispose of the case on a ground neither assigned nor submitted to us under the specified question, in the petition or in the briefs.

Bill Brennan and Harry would DIG the Nixon case. Byron and Thurgood would dispose of it narrowly as a case in which no private cause of action could be implied, limiting the analysis to the special relationship of government employment. John and I prefer to address the cause of action question and would do so broadly along the lines of my Version II memorandum of last spring.

Thus, it is evident that a Court opinion is not assured if each of us remains with our first preference votes. As I view the Nixon case as uniquely requiring a Court opinion, I am now prepared to defer to the wishes of you, Bill Rehqnuist and Sandra and prepare a draft opinion

holding that a President has absolute immunity from damage suit liability for the reasons stated in my Version I memorandum last spring. John and you both joined that memorandum.

I have discussed the situation with John, and he fully shares the view that a Court opinion in a case involving the liability of a President is important institutionally. Subject to a possible reservation that would not prevent a Court opinion, John therefore is willing to decide the Nixon case on absolute immunity.

Sincerely,

The Chief Justice

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 17, 1981

78-1738 Nixon v. Fitzgerald

Dear Chief:

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I have discussed the situation with John, and he fully shares the view that a Court opinion in a case involving the liability of a President is important institutionally. John therefore is willing to decide the Nixon case on absolute immunity. John always has had some question as to the effect of an Act of Congress that

expressly provided a damage remedy against a President - as unlikely as such action may be. He may "reserve" on this question in a way that would not prevent a Court opinion.

With five votes now for an absolute immunity resolution of this case - the question submitted on the collateral order - I will draft an opinion this basis.

Sincerely,

Lewis

The Chief Justice

lfp/ss

cc: The Conference

December 17, 1981

78-1738 Nixon v. Fitzgerald

Dear Chief:

My understanding is that you, Bill Rehnquist and Sandra continue to entertain serious doubt as to whether you would join a disposition of the Nixon case on the cause of action question (sometimes referred to, for brevity, as the Bivens question). Your view is that we took this case in a "collateral issue" context to decide the immunity question, and the three of you continue to have serious reservations as to whether we properly may dispose of the case on a ground neither assigned nor submitted to us under the specified question, in the petition or in the briefs.

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Thus, it is evident that a Court opinion is not assured if each of us remains with our first preference votes. As I view the Nixon case as uniquely requiring a Court opinion, I am now prepared to defer to the wishes of you, Bill Rehnquist and Sandra and prepare a draft opinion holding that a President has absolute immunity from damage suit liability for the reasons stated in my Version I memorandum last spring. John and you both joined that memorandum.

I have discussed the situation with John, and he fully shares the view that a Court opinion in a case involving the liability of a President is important institutionally. John therefore is willing to decide the Nixon case on absolute immunity. John always has had some question as to the effect of an Act of Congress that

expressly provided a damage remedy against a President - as unlikely as such action may be. He may "reserve" on this question in a way that would not prevent a Court opinion.

With five votes now for an absolute immunity resolution of this case - the question submitted on the collateral order - I will draft an opinion this basis.

Sincerely,

The Chief Justice

lfp/ss

cc: The Conference

file

Jan. 29, 1982

TO: MR. JUSTICE POWELL

FROM: DICK FALLON

RE: Attached Nixon Drafts

Attached is my first attempt at a draft in Nixon. The first two sections (about the first 16 pages) deal with the facts of this case and its jurisdictional issues.

The subsequent sections are entirely new, though of course very similar in some respects to last year's Draft VI, Version I. It is only fair to say, however, that there are major changes of emphasis. In doing the research, I became increasingly persuaded of two points. First, the separation of powers is a very flexible doctrine. It is therefore difficult to rest an absolute constitutional prohibition of presidential liability on this doctrine. Second, the Court repeatedly has recognized that the law of immunity is appropriately of judicial making. From this perspective, I think there are much more powerful arguments that the judiciary should not impose liability on the President, at least in the absence of an express command from Congress. At this level I think the separation of powers argument to be much less subject to attacks that it has claimed too much--i.e.,

arguments that an excessively rigid doctrine is inconsistent with such cases as United States v. Nixon and even Youngstown Sheet & Tube Co. v. Sawyer. Thus, at bottom, the draft opinion would hold that the President was absolutely immune from suits for damages at least in the absence of clear congressional action imposing liability; and it reserves--rather than deciding--the question what would happen in that unlikely case of a direct constitutional conflict between the claims of the Executive and Legislative branches. Again, it makes clear that the judiciary must recognize the President as absolutely immune both from Bivens actions and from suits under statutes of merely general applicability.

Beginning with Section III, however, I should say that I think it would be possible simply to readopt the pertinent sections from last year's Draft VI, Version I. I therefore have attached these sections as a second draft for your consideration. The first two sections (dealing with the facts and jurisdiction) are omitted from this draft, which begins with Section III.

I have not yet begun--or really begun to think very seriously about--a Harlow draft. It has occurred to me, however, that changes in Nixon may seem desirable or even necessary to dispose of questions that may arise in Harlow. But I do not think that this should be a problem, as I expect to have at least a rough draft in Harlow well before Nixon is ready to circulate out-of-chambers.

February 18, 1982

79-1738 Nixon v. Fitzgerald

Dear John:

Here is a Chambers draft of an opinion. As we have collaborated on this issue for more than a year, I would, of course, appreciate your reviewing the draft before I circulate it.

Although the basic analysis leading to the holding of absolute immunity remains the same, the opinion is different in several respects from ours last Term. First, it is simplified by the absence of the Title III statutory issue that was the centerpiece of Byron's memorandum. Second, as last year's case involved three defendants in addition to the President, I could focus in this case solely on presidential immunity. Finally, I have said explicitly - in view of your reservation - that we were not expressing any view as to presidential immunity if Congress should authorize a damage suit remedy against any President. I would think it very doubtful whether Congress has any such power.

I am writing a separate opinion in the Fitzgerald case, one that I find more troublesome - particularly since there may well be no consensus of views among five Justices. My bottom line in Fitzgerald will be qualified immunity, the view you and I took last Term with respect to Halderman. At Conference, Sandra also indicated a preference for qualified immunity. I would expect the Chief and Bill Rehnquist to go for derivative immunity. I do not know whether Byron and the Justices who voted with him last Term will elect to reach the immunity issue or will hold that there is no cause of action.

It is increasingly clear, contrary to my expectation, that summary judgment motions have not been successful in preventing long drawn out litigation over

insubstantial claims against officials. For example, in addition to the suit pending here, Ed Levi and other Justice Department officials are defendants in several other suits - with the consequent expense and harassment. I therefore think Jerry Gesell is right in urging that when an immunity defense in pled, the burden of proof on that issue should be allocated to the plaintiff.

I know that you are pressed at this time, and I regret not being able to get the Nixon draft to you earlier.

Sincerely,

Justice Stevens

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 22, 1982

Re: 79-1738 - Nixon v. Fitzgerald

Dear Lewis:

For the most part I think your draft opinion is excellent and I am sure I will join it. I do, however, have one concern that perhaps is nothing more than style but I think may have sufficient importance to discuss with you. At several points in the opinion, at pages 14 through 18, you describe the Executive's immunity as something that is granted by the Court rather than provided by the law. I would be much more comfortable if you could make language changes which I can illustrate by reference to the last few lines on page 14. Instead of stating that federal officials "should be accorded" absolute immunity, could we not say that they "have a right" to absolute immunity. Similarly, instead of a "blanket grant" of absolute immunity, could we not refer to a "blanket recognition." Again, three lines from the bottom, instead of "we extended to federal officials the same qualified immunity we had granted to state officials" could we perhaps say something like "we held that federal officials have the same qualified immunity as state officials."

I am also a little troubled by stating at the top of page 16 that we followed the tradition of common law courts "by freely weighing considerations of public policy." I do not have a specific language change to suggest there, but could it not appropriately be phrased in terms of the Court having relied on considerations of public policy comparable to those that had traditionally been recognized by common law courts, or something similar?

Perhaps this is just a flyspeck, but on page 17, in line 4, I wonder why you say "acts in office" instead of "official acts."

Finally, in the second line on page 18, would it be sufficient to have "recognized immunity of this scope for governors" instead of having "granted" immunity.

In a realistic sense, perhaps your opinion is entirely correct in referring to grants of immunity by judges, but I feel much more comfortable when I am able to say that we are merely applying the law as we understand it to exist independently of the composition of the Court. I think it is especially important to take that approach when the Court is as closely divided as it is on the issue in this case.

Except for these language changes, I really think your opinion is excellent.

Respectfully,

John

Justice Powell

March 5, 1982

TO: MR. JUSTICE POWELL

FROM: DICK FALLON

RE: Nixon, Harlow, and Butterfield

Attached are three drafts, two of which are appended mostly for reference. (1) A Nixon draft, marked up to incorporate (a) your last requested changes; (b) the changes suggested by Justice Stevens; (c) editing changes to make it compatible with the tenor of Harlow; and (d) sundry but essentially insubstantial changes resulting from research in the record done mostly for Harlow.

(2) A printed Harlow draft, also hand-edited, incorporating the changes you requested and a few alterations and additions of mine.

(3) An alternative draft on Harlow Section IV, following the line of analysis that you discussed with Justice White.

There remains for you the major choice which approach to take. When you make it, however, nearly everything should be ready for the printer. As you will notice, clean printed copies would be required before you would want to show anything even

informally to another Justice. I would think, however, that anything and everything could be ready not later than Tuesday.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 18, 1982

PERSONAL

Re: No. 79-1738 - Nixon v. Fitzgerald

Dear Lewis:

I will have some "thoughts" on this case. I particularly am concerned that - without intent to do so - on page 24, you seem to equate Congress and "the press." Heaven knows, they regard themselves as the Fourth Branch and primus inter pares at that!

On the merits, qualified immunity for a senior Presidential aide, cabinet or sub-cabinet officer, does no more than "buy" a lawsuit. Even assuming they will be "winnable" suits that will be only after much harassment and expense. If Harlow becomes law, as appears likely -- and if I were age 40 again -- I would not think one second of accepting the job I once held as Assistant Attorney General. I will be bound to say in dissent that the Court now literally invites "shakedown" suits. In 1956 when I left the Executive Branch, I could not have been "shaken down" for very much, but I'd be subject to harassing lawsuits and in court as a defendant-witness, paying other lawyers to defend me -- instead of being paid for being there!

Regards,

WEB

Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 18, 1982

Re: No. 79-1738 Nixon v. Fitzgerald

Dear Lewis:

I am fully sensible of the considerations mentioned in your letter of transmittal to me and the Chief, and shall make every effort to join your opinion in this case. So long as Butz v. Economu is on the books, I don't see how you can be faulted for relying on it. I agree with the basic thrust of your opinion, and think you have done an excellent job in disposing of the case. The few suggestions I am about to make do not seem to me, and I hope they do not seem to you, to suggest any major (or even minor) alteration in the structure of the opinion.

My concerns are these:

(1) Page 17, sixth line from the bottom: You describe one of the functions of the President as "the administration of justice." I don't know that any great damage would be done by leaving that as is, but it seems to me that the "administration of justice" is more the function of the courts under Article III than it is of the President. I think the opinion would be improved if you could see your way clear to change that phrase to something like "law-enforcement."

(2) Page 19, fn. 35: You state in the third paragraph of this footnote, on page 20, that the absolute immunity accorded the President should extend to "acts within the 'outer perimeter' of the area of his official responsibility." Since in the final paragraph of the footnote you conclude that the acts he performed "lay well within the outer perimeter of his authority," I would prefer to see the Court reserve judgment on the question of how far the President's absolute immunity extends. Since you conclude, correctly, in my opinion, that he meets the definition laid down in Barr v. Matteo, I should think the

discussion could be phrased in terms of an assumption that the President's immunity extends at least to the outer perimeter, and a conclusion that under this assumption the test is satisfied in this case.

(3) Page 23, carry-over sentence: You state that "Presidents may be prosecuted criminally, at least after they leave office." While this may well be correct, it seems to me there is absolutely no necessity for saying so in this case; it is not an issue here, and so far as I know the Court has never so held. The language from Story's Commentaries, which you quote in fn. 33 on page 19, speaks of the person of the President possessing an "official inviolability" "in civil cases at least." This would seem to indicate that at least in Story's mind, the question was an open one. I see no need to salve the wounds of the losing view in this case by throwing them a bone which may come back to haunt us.

Sincerely,

WWW

Justice Powell

March 18, 1982

PERSONAL

79-1738 Nixon v. Fitzgerald
80-945 Harlow v. Fitzgerald

Dear Chief:

This is in reply to your personal letter.

As to the sentence on page 24 of Nixon, certainly the press as well as Congress exercises considerable restraint on the conduct of a President. As much as I deplore his means, Woodward's expose of Watergate preceded any action by Congress. I will try, however, to clarify the language.

The second paragraph of your letter puzzles me. You say that if "Harlow becomes the law", the Court will then "literally invite shakedown suits". As I view it, Harlow mirrors present law. As now drafted, its only effect on present law will be to make it more difficult for plaintiffs to win these suits.

Butz v. Economou is now the law. The defendant in that suit was a Cabinet member, and the opinion adopted qualified immunity as the standard applicable to executive officials, except for those performing specially protected functions, such as judges and prosecutors. I joined Butz because it was foreshadowed - if not controlled by - your opinion for the Court in Scheuer v. Rhodes.

You read Gravel more broadly than I ever have. However one reads it, Gravel was decided before both Scheuer and Butz. In sum, rather than make new doctrine, I have simply followed these two well established precedents of this Court.

For the reasons stated in my letter of yesterday to you and Bill Rehnquist, I am proposing a modification in the Wood v. Strickland standard. This seems permissible because necessary to attain the balance contemplated by Butz itself.

I have no idea whether my draft in this case will attract a Court. I do have a rather strong feeling that, from your viewpoint, as I understand it, my draft is likely to be better than any alternative that the Court will adopt.

Sincerely,

The Chief Justice

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 18, 1982

Re: 79-1738 - Nixon v. Fitzgerald

Dear Lewis:

Please join me.

Respectfully,

JPS

Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 18, 1982

Re: No. 79-1738 - Nixon v. Fitzgerald
80-945 - Harlow et al. v. Fitzgerald

Dear Lewis:

In due course I will be joining you in 79-1738 and dissenting in 80-945. Since I am not prepared, now, to overrule Gravel sub silentio -- or otherwise.

A Presidential aide, for example, may be elbow-to-elbow with a President several times a day preparing to implement key government policies, while the cabinet officer you referred to may not see a President for weeks. If a Senator's aide "inherits" the Senator's immunity, there is vastly greater reason why a senior Presidential aide, who deals with matters of far greater moment, is denied the same protection. Perhaps we are on the way to generating a new industry in the insurance world - "Public Liability Insurance" for public officials!

For me it simply "will not wash" to hold that the aides of a Senator with a few hundred thousand constituents and a dozen aides derive absolute immunity from the Senator, but that Senior Aides to a President -- who has 225 million constituents and a large staff of Senior Aides -- do not have the same immunity as those of Senator Gravel. Expressed or not this overrules Gravel or leaves our cases in irreconcilable confusion.

Regards,

WEB

Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 22, 1982

Re: 79-1728 - Nixon v. Fitzgerald

Dear Lewis,

I shall file a dissent in this case. It should be done by the time the ferry goes.

Sincerely yours,

Justice Powell

Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

March 29, 1982

No. 79-1738 Nixon v. Fitzgerald

Dear Lewis,

Please join me.

Sincerely,

Sandra

Justice Powell

Copies to the Conference

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

LHP

From: **The Chief Justice**

Circulated: MAR 3 1 1982

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1738

RICHARD NIXON, PETITIONER, *v.*
A. ERNEST FITZGERALD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[April —, 1982]

I read Your as concurring only in the judgment — which is to be regretted:

Memorandum of Concurrence, CHIEF JUSTICE BURGER.

I write separately to emphasize that the presidential immunity spelled out today derives from and is mandated by the Constitution. Absolute immunity for a President is either implicit in the constitutional doctrine of separation of powers or it does not exist.

Although immunity for governmental officials in *Bivens* type actions may have been "of judicial making," *ante*, at 15, the immunity of a President from civil suits is not simply a doctrine derived from this Court's interpretation of common law or public policy. Of course we are "guided" by the Constitution, *ante*, at 15, but I could not join an opinion finding absolute immunity for the President based on some vague, undifferentiated theory independent of the Constitution.

The essential purpose of the doctrine of separation of powers is to allow for independent functioning of each co-equal branch of government within its assigned sphere of responsibility, free from risk of control or intimidation by other branches. *United States* v. *Nixon*, 418 U. S. 683, 706–707 (1974); *United States* v. *Gravel*, 408 U. S. 606, 617 (1972). Even prior to the adoption of our Constitution, judicial review of legislative action was recognized in some instances as necessary to maintain the proper checks and balances. *Den on the Dem. of Bayard & Wife* v. *Singleton*, 1 Martin 42

(N.C. 1787); *Cases of the Judges of the Court of Appeals*, 4 Call's 135 (1788). *Cf. Marbury* v. *Madison*, 1 Cranch 137 (1803). It has not been used, however, to control or intimidate other branches. The proposed opinion correctly observes that judicial intrusion through private damage actions improperly impinges on and hence interferes with the essential independence of a President.[1]

Exposing a President to civil damage actions for official acts within the scope of the Executive authority unduly subjects presidential actions to judicial scrutiny. The judiciary always must be hesitant to probe into the elements of presidential decision-making and such judicial intervention is not to be tolerated absent imperative constitutional necessity. We found such intervention warranted in order to assure the proper administration of justice. *United States* v. *Nixon*, 418 U. S., at 709–716.[2] No such intervention is warranted in the present case.

The enormous range and impact of presidential decisions—inescapably beyond that of any one Member of Congress—inevitably means that large numbers of persons will consider themselves aggrieved by such acts. Absent absolute immunity, every person who feels aggrieved may bring a suit for damages, and each suit—especially those that proceed on the merits—will involve at least a minimum of judicial questioning of presidential acts, including the reasons for the action and the information on which it was based. This kind of scrutiny of day-to-day decisions of the Executive Branch would inevitably occur if private civil damage actions are

---

[1] The separation of powers doctrine is implicated to the extent that the courts entertain private damage actions for presidential acts taken in the "outer perimeter" of the President's official responsibility. *Ante*, at 19–20, n. 35. We do not consider here suits involving acts outside the "outer perimeter" of official authority.

[2] This concept emerged in the early years of our national existence as well. *United States* v. *Burr*, 4 Cranch 469, 507 (1807).

brought to advance the private interests of the individual citizen. Although the individual who claims wrongful conduct may indeed have sustained some injury, the need to prevent inevitable large-scale invasion of the Executive function by the judiciary far outweighs the need to vindicate the private claims. We have decided that in precisely this same sense, the need of a Member of both Houses of Congress and their aides to be free from such judicial scrutiny outweighs the need for private redress of one claiming injury from acts of a Member or aide of a Member.[3]

Judicial intervention would also inevitably inhibit the processes of Executive Branch decision-making and impede the functioning of the Office of the President. Imposition of liability for damage actions would have a serious effect of diverting the attention of a President from his executive duties since defending a lawsuit today—even a lawsuit ultimately found to be frivolous—often requires significant expenditures of time and money. There is a significant likelihood that a President, whose unfettered discretion is absolutely essential to the functioning of the Executive Branch, would have to weigh the possibility of litigation in making or authorizing decisions. Many problems arise in which the choice of the Executive may be a "close call" on a particular decision or course of action; fear of a lawsuit could well inhibit appropriate action. Ultimate vindication on the merits after trial is plainly

---

[3] The Federal Tort Claims Act of 1946 reflects this policy distinction; in it Congress waived sovereign immunity for certain damage claims, but pointedly excepted any "discretionary function or duty . . . whether or not the discretion involved be abused." 28 U. S. C. § 2680(a) (1976). For such injuries Congress may in its discretion provide separate non-judicial remedies such as private bills.

In this case Fitzgerald received substantial relief through the route provided by Congress: the Civil Service Commission ordered him reinstated with backpay. Joint App. 87a–88a. In addition, he has to date received $142,000 in partial settlement of the suit. *Nixon* v. *Fitzgerald*, *ante*, at 11. Respondent can hardly argue that he has been denied relief.

a paper shield for a President.

In short, the constitutional concept of separation of co-equal powers dictates that a President be immune from civil damage actions based on acts within the broad scope of Executive authority.[4] Even when a President, acting in his official capacity, takes actions later held to be unconstitutional, an aggrieved citizen's recovery must be by way of Congressional acts designed to limit intrusion of the judiciary into presidential affairs.

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[4] Human fallibility being a reality, Congress in the Federal Tort Claims Act took pains to recognize that even when governmental action is in error, sovereign immunity is preserved for discretionary acts. See 28 U. S. C. § 2680(a) (1976).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 5, 1982

Re: No. 80-945 Harlow v. Fitzgerald

Dear Lewis:

Please join me in your proposed opinion. I anticipate writing a separate concurrence consisting of about one paragraph.

Sincerely,

WHR

Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 5, 1982

Re: No. 79-1738 Nixon v. Fitzgerald

Dear Lewis:

Please join me in the most recent circulation of your proposed opinion.

Sincerely,

WHR

Justice Powell

cc: The Conference

Limitations on judicial implied Bivens remedies

In Kerungaro (April 8 draft of II)

Bivens v. Six Unknown Agts (4th Amend case) emphasized absence of ~~any~~ any "special factors" counseling hesitation in allowing a cause of action - 13

In my Kerungaro (Version II) found we would have adopted a per se rule vs. any Bivens suit vs a President (p 15, n 20)

Harlan's concurring op. in Bivens: "The range of policy consideration we may take into a/c in at least as broad as the range of those a legislature would consider in authorizing a remedy" - 13 (403 US at 407)

In Passman (Bivens suit under 5th) the Court ~~recognized~~ noted the existence of "special concerns" ~~concerns~~ counseling hesitation", but held these concerns were "coextensive" with the Speech or Debate Clause, & since that Clause did not protect Passman - the Bivens remedy was upheld + 14

Butz v Economou expressly reserved the Q whether a Bivens suit can ever be premised on a violation of the 1st & 14th Amend (438 US at 486 n 8)

Carlson v Green (Bivens suit vs prison officials) ~~was~~ emphasized that they "do not enjoy such independent status in our constitutional scheme" as to ~~be~~ made a "judicially created remedy inappropriate" - 446 US. 14, 19 (1980)

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Blackmun**

Circulated: _____

Recirculated: JUN 1 [illegible]

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1738

RICHARD NIXON, PETITIONER *v.*
A. ERNEST FITZGERALD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June —, 1982]

JUSTICE BLACKMUN, dissenting.

I join JUSTICE WHITE'S dissent. For me, the Court leaves unanswered his unanswerable argument that no man, not even the President of the United States, is absolutely and fully above the law. See *United States* v. *Lee*, 106 U. S. 196, 220 (1882),[1] and *Marbury* v. *Madison*, 1 Cranch. 137, 163 (1803).[2] Until today, I had thought this principle was the foundation of our national jurisprudence. It now appears that it is not.

Nor can I understand the Court's holding that the absolute immunity of the President is compelled by separation-of-powers concerns, when the Court at the same time expressly leaves open, *ante*, at 16, and n. 27, the possibility that the President nevertheless may be fully subject to congressionally-created forms of liability. These two concepts, it

---

[1] "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it."

[2] "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court."

seems to me, cannot coexist.

I also write separately to express my unalleviated concern about the parties' settlement agreement the key details of which were not disclosed to the Court by counsel until the veritable "last minute," and even then, only because the Halperins' motion to intervene had directed the Court's attention to them. See *ante*, at 11, n. 24. The Court makes only passing mention of this agreement in Part IIB of its opinion.

For me, the case in effect was settled before argument by petitioner's payment of $142,000 to respondent. A much smaller sum of $28,000 was left riding on an outcome favorable to respondent, with nothing at all to be paid if petitioner prevailed, as indeed he now does. The parties publicly stated that the amount of any payment would depend upon subsequent proceedings in the District Court; in fact, the parties essentially had agreed that, regardless of this Court's ruling, no further proceedings of substance would occur in the District Court. Surely, had the details of this agreement been known at the time the petition for certiorari came before the Court, certiorari would have been denied. I cannot escape the feeling that this long-undisclosed agreement comes close to being a wager on the outcome of the case, with all of the implications that entails.

Havens Realty Corp. v. *Coleman*, —— U. S. —— (1982), most recently—and, it now appears, most conveniently—decided, affords less than comfortable support for retaining the case.[*] The pertinent question here is not whether the case

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[*] The agreement in *Havens* was not final until approved by the District Court, —— U. S., at —— (slip op. 6). In the present case, the parties made their agreement and presented it to the District Court only after the fact. Further, there was no preliminary payment in *Havens*. Each respondent there was to receive $400 if the Court denied certiorari or affirmed, and nothing if the Court reversed. Here, $142,000 changed hands regardless of the subsequent disposition of the case, with the much smaller sum of $28,000 resting on the Court's ultimate ruling. For me, this is not

is moot, but whether this is the *kind* of case or controversy over which we should exercise our power of discretionary review. Cf. *United States* v. *Johnson*, 319 U. S. 302 (1943).

Apprised of all developments, I therefore would have dismissed the writ as having been improvidently granted. The Court, it seems to me, brushes by this factor in order to resolve an issue of profound consequence that otherwise would not be here. Lacking support for such a dismissal, however, I join the dissent.

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the kind of case or controversy contemplated by Article III of the Constitution.

June 1, 1982

TO: MR. JUSTICE POWELL

FROM: DICK FALLON

RE: Fourth Nixon Draft

Pending word on changes that you might wish to make, I have begun "marking up" a Fourth Nixon draft in light of Justice White's and Justice Blackmun's recent circulations. Except as indicated here, all changes are entirely stylistic, based from my increasing familiarity with the Court Style Book.

Page 18. Justice White's latest draft (page 9) quotes someone who had thought of suing the President for damages. Accordingly I would just omit the sentence, which adds little, that litigation of this kind may have been "unthinkable."

Page 19. Justice White has toughened his claim about the relevant history. See his opinion at 6 + 15. I think we need to respond somewhat in kind. Language is suggested.

Pages 23-25. Now that Justice Blackmun has written, we have to identify the particular dissent to which we are

responding. Accordingly, I have sprinkled Justice White's name throughout the footnotes.

Response to HAB. I also have attached a draft paragraph responding to the claim--asserted most clearly by HAB--that we cannot "divide" the absolute immunity question so as to reserve the case where Congress had expressly contemplated Presidential liability. I think he is wrong, and that we can make this clear if you think it appropriate to do so. (One consideration of course is whether it would pass easily by SOC, WHR, and the Chief; I don't see why it wouldn't, but there is always a risk.) If you wish to include something along these lines, it could be: (i) added to Footnote 27 on page 16 or (ii) "dropped" as a new footnote at the end of the Story quotation on page 17.

Duck - I think it best to leave this out for now. If would excite the Chief. If JPS or Sandra are disturbed I'll talk to them. You are right of course

Rider A [illegible] quotation on

JUSTICE BLACKMUN, ~~ante~~ post, at 1, purports not to understand how an express congressional creation of Presidential liability could alter the separation-of-powers analysis applicable to a President's claim of absolute immunity. In Nixon v. General Services Administration, 433 U.S. 425, 433 (1977), we recognized that the separation of powers doctrine would require a balancing approach to competing claims of constitutional prerogative asserted by two Branches of Government. In the event of congressional action explicitly creating Presidential liability, we may assume that an argument for absolute Presidential immunity would be supported by most of the factors on which we rely today. On the other hand, an express congressional assertion of its legislative power would add an important constitutional consideration to the factors weighing against absolute Presidential immunity from suit under this hypothetical statute. We have no occasion to decide the balance that would be constitutionally required in such a case.

Hold

Rider A

Rider A could be added to footnote 27 or "dropped" as a footnote from the Story quotation on page 17

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powers doctrine would require a balancing approach to competing claims of constitutional prerogative asserted by two Branches of Government. In the event of congressional action explicitly creating Presidential liability, we may assume that an argument for absolute Presidential immunity would be supported by most of the factors on which we rely today. On the other hand, an express congressional assertion of its legislative power would add an important constitutional consideration to the factors weighing against absolute Presidential immunity from suit under this hypothetical statute. We have no occasion to decide the balance that would be constitutionally required in such a case.

Hold

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 1, 1982

RE: No. 79-1738 Nixon v. Fitzgerald

Dear Harry:

Please join me in your dissent in the above.

Sincerely,

Bill

Justice Blackmun

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 2, 1982

Re: No. 79-1738 - Nixon v. Fitzgerald

Dear Harry:

I have already joined BRW's dissent. I now join your dissent.

Sincerely,

T.M.

Justice Blackmun

cc: The Conference

lfp/ss 06/02/82 Rider A, p. 19 (Nixon)

NIXON19 SALLY-POW

Justice White's dissent intimates that we minimize the importance of this historical evidence by its location in a footnote, rather than in text. See, post, n. 2, at 6, and at 15. We had not supposed that the merit of this sort of documentation depends upon its location in a Court opinion. In light of the fragmentary character of the materials - none of which addressed specifically the then remote possibility of a damage suit liability of a President - we do think the most compelling arguments for abso-

lfp/ss 06/07/82

DRAFT

On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was "clearly established" at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, however, the immunity defense ordinarily should fail since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have know of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors.

Personal

lfp/ss 06/08/82 CN SALLY-POW

79-1738 Nixon v. Fitzgerald

Dear Chief:

Thank you for your personal letter, just received. I reply promptly as this case should be ready to come down on Monday - after two long years.

Obtaining and holding four votes for an opinion on this sensitive question has not been easy. Although John has been cooperative throughout, he has insisted from the outset that we expressly leave open the constitutional question that would arise if Congress ~~expressly~~ sought to impose a damages liability on a President. I am confident that he would not join the opinion unless this issue were left open.

Byron complicated the situation when he relied, as he has, on the fact that - in the present posture of the case - we must assume that an implied cause of action exists against the President both under Bivens and the statutes. Thus, I had to address this in my opinion, and working it out with the Justices who had joined me was not easy. Both John and Sandra were concerned, and it was

necessary for me to rewrite the note several times. I cannot change it now.

I fully understand your view that Congress has no authority to impose a damages liability on the President. Indeed, I am inclined to agree with you. But the issue is not here, and the probability is that it never will arise. Even if a bill to this effect were adopted by both Houses of Congress, the President surely would veto it. Thus, the situation that concerns us will never arise unless at least two-thirds of both houses wish to create this sort of constitutional crisis.

I suggest, Chief, in all seriousness that it may be wiser now to have a five Justice Court opinion, especially one joined by the Chief Justice. We have expressly left open the issue, but in view of the basic rationale of the opinion I would have no doubt as to the ultimate outcome.

I am concerned, however, that your absence from the majority opinion may dilute its authority. It will be characterized, of course, as a plurality and one that did not even attract the vote of the Chief Justice. The fact

that you may have gone a bit farther than the plurality still leaves that opinion, with all of its basic analysis, without a majority.

For these reasons I very much hope you will join the opinion expressly, adding whatever you wish to add in your concurrence. For example, you could, if you wish, join the opinion except its reservation with respect to affirmative congressional action. If you should do this, I hope you will not refer to Harry's point as to whether there is "anything to reserve". I have had trouble enough holding my "troops" together because of this and related questions.

After two years, we are on the verge of settling - I think for all time - a major constitutional question. I hope the Chief Justice of the United States will add his voice to this resolution.

Sincerely,

June 8, 1982

79-1738 Nixon v. Fitzgerald

Dear Chief:

I do not believe you have ever expressly joined the Court opinion, although in your letter of March 18 you said:

"In due time I will join you in 79-1738."

As there now appears to be a fair chance of bringing Nixon and Harlow down on Monday, I would like to be sure of your join.

Sincerely,

The Chief Justice

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

(Received late afternoon on 6/8

PERSONAL

June 8, 1982

Re: No. 79-1738 - Nixon v. Fitzgerald

Dear Lewis:

I am making a few stylistic changes in my concurring opinion, but adding one that is more than stylistic. It is really the entire point of my concurrence that the immunity is Constitutional. That being so I do not see the basis for any suggestion (your Note 27) that there is any reserved question.

My substantive footnote (N.7) will read as follows, probably on the final page:

"In a footnote the Court suggests that 'we need not address directly' whether Congress could create a damages action against a President. However, once it is established that the Constitution confers absolute immunity, as the Court holds today, legislative action cannot alter that result. Marbury v. Madison, 1 Cranch 137 (1803)."

I had thought that was firmly settled law since Marbury v. Madison. In short, Harry has a point at his page 1-2. In other words, there is no question to "reserve."

You could solve this, of course, by omitting Note 27. It is incongruous that a plurality of four "invites" Congress to engage in an obviously futile act of passing a statute unconstitutional on its face.

In short, we ought to "bite the bullet" after all the travail you have borne for two Terms.

I would be glad to discuss.

Regards,

WEB

Justice Powell

June 8, 1982

PERSONAL

79-1738 Nixon v. Fitzgerald

Dear Chief:

Thank you for your personal letter, just received. I reply promptly as this case should be ready to come down on Monday - after two long years.

Obtaining and holding four votes for an opinion on this sensitive question has not been easy. Although John has been cooperative throughout, he has insisted from the outset that we expressly leave open the constitutional question that would arise if Congress sought to impose a damages liability on a President. I am confident that he would not join the opinion unless this issue were left open.

Byron complicated the situation when he relied, as he has, on the fact that - in the present posture of the case - we must assume that an implied cause of action exists against the President both under Bivens and the statutes. Thus, I had to address this in my opinion, and working it out with the Justices who had joined me was not easy. Both John and Sandra were concerned, and it was necessary for me to rewrite the note several times. I cannot change it now.

I fully understand your view that Congress has no authority to impose a damages liability on the President. Indeed, I am inclined to agree with you. But the issue is not here, and the probability is that it never will arise. Even if a bill to this effect were adopted by both Houses of Congress, the President surely would veto it. Thus, the situation that concerns us will never arise unless at least two-thirds of both houses wish to create this sort of constitutional crisis.

I am concerned, however, that your absence from the majority opinion may dilute its authority. It will be characterized, of course, as a plurality and one that did not even attract the vote of the Chief Justice. The fact that you may have gone a bit farther than the plurality

still leaves that opinion, with all of its basic analysis, without a majority. A plurality on an issue as inflammatory as this one (see opinions of dissenting judges here and in Harlow), will invite future challenges when the composition of the Court changes.

For these reasons I very much hope you will join the opinion expressly, adding whatever you wish to add in your concurrence. For example, you could, if you wish, join the opinion except only its reservation with respect to affirmative congressional action. If you should do this, I hope you will not refer to Harry's point as to whether there is "anything to reserve". I have had trouble enough holding my "troops" together because of this and related questions.

After two years, we are on the verge of settling - I think for all time - a major constitutional question. But we need the agreement of the Chief Justice of the United States.

Sincerely,

The Chief Justice

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 10, 1982

Not sent - as I talked to C J

79-1738 Nixon v. Fitzgerald

Dear Chief:

As I wrote yesterday afternoon, I am entirely willing to confer - as you suggest. It may possibly shorten our discussion if I respond to what I now understand to be your objection to note 27. You say that it "significantly undermines the entire holding of the case", and that the opinion "gives intimations that Congress - under some circumstances - could change it".

Then you quote Harry's conclusory, off-hand statement that my opinion is contradictory, and that the Court "cannot have it both ways".

I respond to these points. Having devoted, in total, more time on the Nixon case last Term, and on Nixon and Harlow this Term, than on any half a dozen cases since I have been on the Court, I have no intention of "undermining" the end product of all of this labor. So far as I know, you are the only member of the Court who entertains this view. Nor do I find in the opinion any "intimations" that it would be lawful for Congress to impose specifically a damages liability.

I come now to what we will call Harry's "can't have it both ways" dictum. As I have said to you and others with us in this case, my own view is that it would be unconstitutional for Congress to impose a damage liability on the President.

But I cannot say that it is irrational to think that reasonable minds may not differ if Congress were to enact specific legislation, identifying certain limited types of conduct that would justify a damages remedy if a President knowingly violated the statute. Moreover, I followed your opinion in the Nixon tapes case in applying what in effect is a balancing type of analysis. A statute duly adopted by Congress, and signed by an incumbent President, certainly would be a new factor - not present in this case - that a court would weigh. In the Nixon tapes case you engage in precisely the same type of weighing constitutional and policy considerations.

Proceeding on the theory that we do not decide constitutional issues not presented, I have included the reservation - to which you object in note 27 - in every circulation since my first draft of March 17.

After Byron argued that we must assume that implied private causes of action exist in this case (as is correct), I enlarged note 27 as a response to him. Under the collateral order doctrine, we are addressing only the immunity issue. You will recall your insistence that we write the case this way, rather than dispose of it on the theory that there was neither a Bivens remedy nor an implied cause of action. Therefore, our holding will be that at least where there is only an implied cause of action, the immunity of a President is absolute.

I repeat, however, that I will be happy to discuss all of this further.

Sincerely,

Lewis

The Chief Justice

LFP/vde

lfp/ss 06/10/82

MEMORANDUM

79-1738 Nixon v. Fitzgerald

In his dissenting opinion, Harry states he cannot "understand the Court's holding that the absolute immunity of the President is compelled by separation-of-powers concerns, when the Court at the same time expressly leaves open ... the possibility that the President nevertheless may be fully subject to congressionally-created forms of liability." The two concepts, he contends, "cannot coexist."

In my view Harry is simply wrong. His argument misapprehends the balancing approach to separation-of-powers questions prescribed by recent decisions of this Court. Our unanimous opinion in the Nixon Tapes Case is a highly relevant example. In language substantially identical to that used to describe the President's absolute immunity in this case, the Court stated that the President's evidentiary "privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." 418 U.S., at 708. Nonetheless, in the Tapes case, and despite finding that the privilege was constitutionally mandated, we held that other factors of constitutional weight could be more weighty in a particular case. See pp. 711-712:

> "In this case we must weigh the importance of the general privilege of confidentiality of Presidential communications in performance of the President's responsibilities against the inroads of such a privilege on the fair administration of criminal justice."

The reservation in this case merely represents an application of the balancing analysis applied in United States v. Nixon. Like the President's evidentiary privilege, absolute Presidential immunity fairly may be described as "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." In this sense the President's absolute immunity is "constitutional." At the same time, however, the constitutional factors mandating absolute immunity can be described, under a balancing approach, as defining the weight only on one side of the scale.

In this case at p. 16, my opinion says:

> "We consider this immunity a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers. . . ."

My opinion holds that the constitutional grounds supporting absolute Presidential immunity outweigh the arguments advanced by BRW for civil damages liability.

In the unlikely event that Congress acts directly to impose liability, another constitutional factor would have to be considered: Namely, the fact that Congress had enacted legislation approved by the encumbent President, that purported to impose a damages liability. The

reservation in note 27 of my opinion merely acknowledges this. It does not suggest that the constitutional arguments supporting immunity would be diminished in such a case. Nor does the reservation imply how the balance then would be struck in such a case. The reservation simply acknowledges that direct congressional action would confront this Court with a different case and a different constitutional question--a question that need not be decided now, even though the method of analysis would be the same.

My opinion's approach thus accords with the Court's settled, prudent policy of avoiding unnecessary decisions of constitutional questions.

L.F.P., Jr.

ss

79-1738 Nixon v. Fitzgerald

In Justice White's note 2 he suggests - prior to today - Presidents, prosecutors, judges, congressional aides and other officials, "could have been held liable for the kind of cliam put forward by Fitzgerald - a personnel decision made for unlawful reasons." [emphasis added] This is simply not so. The law has not heretofore permitted a plaintiff to recite "magic" words and have the incantation operate to make the immunity vanish. Moreover, and more fundamentally, Justice White errs in treating all of the above named officials as if the scope of their authority were identical. The authority of a President, head of the executive branch of our government - a wholly unique office - is far broader than that of any other official. As the Court states a President has authority in the course of personnel changes in an executive department to make personnel decisions. This is not to say that, in a given case, it would not be appropriate to raise the question whether an official - even the President - had acted "within the scope of (the official's) constitutional and statutory duties". The doctrine of absolute immunity does not extend beyond such action.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 10, 1982

Re: No. 79-1738 - Nixon v. Fitzgerald

Dear Lewis:

I am amending my concurring opinion in this case as follows:

(a) Insert on page 1, after first full paragraph the following:

> However, that does not mean a President is "above the law." Nixon v. United States, 418 U.S. 683 (1974). The dissents are very wide of the mark to the extent that they imply that the Court today recognizes a sweeping immunity for a President for all acts. The Court does no such thing. The immunity, as spelled out by the Court today, is limited to decisions and actions within the scope of a President's constitutional and statutory duties. Ante, at 20-22, n. 34. A President, like a Member of Congress, a judge, a prosecutor or a congressional aide, all with absolute immunity, is not immune for acts outside official duties that inflict injury on others. "Straw men" are, of course, more easily toppled than real ones.

(b) Insert on page 5 after line 2 (the final sentence of the opinion), the following:

> Far from placing a President "above the law" the Court's holding places a President on essentially the same footing with judges and the other officials whose absolute immunity we have recognized.

(c) Footnote 6, page 5, now reads:

> In footnote 27 the Court suggests that "we need not address directly" whether Congress could create a damages action against a President. However, the Court has addressed that issue and resolved it; once it is established that the Constitution confers absolute immunity, as the Court holds today, legislative action cannot alter that result. Nothing in the Court's opinion is to be read as suggesting that a constitutional holding of this Court can be legislatively overruled or modified. Marbury v. Madison, 1 Cranch 137 (1803).

Regards,

WEB

Justice Powell

P.S. You can easily trigger a Tuesday release by sending a memo when the full print comes around tomorrow. Or I'd be glad to initial it

WEB

lfp/ss 06/10/82

MEMORANDUM

79-1738 Nixon v. Fitzgerald

In his dissenting opinion, Harry states he cannot "understand the Court's holding that the absolute immunity of the President is compelled by separation-of-powers concerns, when the Court at the same time expressly leaves open ... the possibility that the President nevertheless may be fully subject to congressionally-created forms of liability." The two concepts, he contends, "cannot coexist."

In my view Harry is simply wrong. His argument misapprehends the balancing approach to separation-of-powers questions prescribed by recent decisions of this Court. Our unanimous opinion in the Nixon Tapes Case is a highly relevant example. In language substantially identical to that used to describe the President's absolute immunity in this case, the Court stated that the President's evidentiary "privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." 418 U.S., at 708. Nonetheless, in the Tapes case, and despite finding that the privilege was constitutionally mandated, we held that other factors of constitutional weight could be more weighty in a particular case. See pp. 711-712:

> "In this case we must weigh the importance of the general privilege of confidentiality of Presidential communications in performance of the President's responsibilities against the inroads of such a privilege on the fair administration of criminal justice."

The reservation in this case merely represents an application of the balancing analysis applied in United States v. Nixon. Like the President's evidentiary privilege, absolute Presidential immunity fairly may be described as "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." In this sense the President's absolute immunity is "constitutional." At the same time, however, the constitutional factors mandating absolute immunity can be described, under a balancing approach, as defining the weight only on one side of the scale.

In this case at p. 16, my opinion says:

> "We consider this immunity a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers. . . ."

My opinion holds that the constitutional grounds supporting absolute Presidential immunity outweigh the arguments advanced by BRW for civil damages liability.

In the unlikely event that Congress acts directly to impose liability, another constitutional factor would have to be considered: Namely, the fact that Congress had enacted legislation approved by the encumbent President, that purported to impose a damages liability. The

reservation in note 27 of my opinion merely acknowledges this. It does not suggest that the constitutional arguments supporting immunity would be diminished in such a case. Nor does the reservation imply how the balance then would be struck in such a case. The reservation simply acknowledges that direct congressional action would confront this Court with a different case and a different constitutional question--a question that need not be decided now, even though the method of analysis would be the same.

My opinion's approach thus accords with the Court's settled, prudent policy of avoiding unnecessary decisions of constitutional questions.

L.F.P., Jr.

ss

not asked

lfp/ss 06/11/82 Rider A, p. 25 (Nixon)

NIXON25 SALLY-POW

The dissenters, reaching for authority to support their position, cite a current edition of Time magazine. Apart from the novelty of citing a popular mangazine on a constitutional issue, the article, of course, made no reference to damages liability. Rather, its statement merely reflected the judgment of this Court in the Nixon tapes case and the impeachment resolution of the House Judiciary Committee. Contrary to the contention of the dissenters, and President's continuing amenability to these forms of legal process demonstrates the transparent fallacy - rather than the correctness - of the dissenting view. This case involves only immunity from

private damage suit liability for decision and actions within the scope of a President's authority.

June 11, 1982

79-1738 Nixon v. Fitzgerald

Dear Chief:

As your revised concurring opinion has now been circulated, I write to say that I am ready for the case to come down - provided, of course, the dissenting Justices also are ready.

Is there a possibility that we could do this on Tuesday?

Sincerely,

The Chief Justice

lfp/ss

cc: Conf.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 11, 1982

Re: 79-1738 - Nixon v. Fitzgerald

Dear Lewis,

I shall not be ready in Nixon by Tuesday.

Sincerely yours,

Byron

Justice Powell

Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 11, 1982

Re: No. 79-1738 - Nixon v. Fitzgerald

MEMORANDUM TO THE CONFERENCE:

I will add to Note 2 page 2 the following:

"75000 public officers have absolute immunity from civil damage suits for acts within the scope of their official function."

Regards,

WEB

June 11, 1982

79-1738 Nixon v. Harlow

Dear Chief, Bill, John and Sandra:

First, we welcome the constructive and supportive changes made by the Chief Justice in his concurring opinion.

I now ask your advice. In Byron's latest circulation, his note 2 on page 4 cites Time magazine. This presents a rather tempting "target". What would you think of my adding a note - as enclosed - as a separate paragraph in note 42 at the end of our opinion on page 25?

As we may be able to bring this case down on Tuesday, I would appreciate your thoughts this morning if convenient.

Sincerely,

The Chief Justice
Justice Rehnquist
Justice Stevens
Justice O'Connor

lfp/ss

for acts outside official duties.[2]

The immunity of a President from civil suits is not simply a doctrine derived from this Court's interpretation of common law or public policy. Of course we are "guided" by the Constitution, *ante*, at 15, but absolute immunity for a President for acts within the official duties of the Chief Executive is to be found in the constitutional separation of powers or it does not exist. The Court today holds that the Constitution mandates such immunity and I agree.

The essential purpose of the separation of powers is to allow for independent functioning of each co-equal branch of government within its assigned sphere of responsibility, free from risk of control, interference, or intimidation by other branches. *United States* v. *Nixon*, 418 U. S. 683, 706–707 (1974); *United States* v. *Gravel*, 408 U. S. 606, 617 (1972). Even prior to the adoption of our Constitution, as well as after, judicial review of legislative action was recognized in some instances as necessary to maintain the proper checks and balances. *Den on the Dem. of Bayard & Wife* v. *Singleton*, 1 Martin 42 (N.C. 1787); *Cases of the Judges of the Court*

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[2] In their "parade of horribles" and lamentations, the dissents also wholly fail to acknowledge why the same perils they fear are not present in the absolute immunity the law has long recognized for numerous other officials. The dissenting opinions manifest an astonishing blind side in pointing to that old reliable that "no man is above the law." The Court has had no difficulty expanding the absolute immunity of Members of Congress, and in granting derivative absolute immunity to numerous aides of Members. *United States* v. *Gravel*, 408 U. S. 606 (1972). We have since recognized absolute immunity for judges, *Stump* v. *Sparkman*, 435 U. S. 349 (1978), and for prosecutors, *Imbler* v. *Pachtman*, 424 U. S. 409 (1976), yet the Constitution provides no hint that either judges, prosecutors or Congressional aides should be so protected. Absolute immunity for judges and prosecutors is seen to derive from the common law and public policy, which recognize the need to protect judges and prosecutors from harassment. The potential danger to the citizenry from the malice of thousands of prosecutors and judges is at once more pervasive and less open to constant, public scrutiny than the actions of a President.

of Appeals, 4 Call's 135 (1788). Cf. *Marbury* v. *Madison*, 1 Cranch 137 (1803). However, the Court's opinion correctly observes that judicial intrusion through private damage actions improperly impinges on and hence interferes with the independence that is imperative to the functions of the office of a President.

Exposing a President to civil damage actions for official acts within the scope of the Executive authority would inevitably subject presidential actions to undue judicial scrutiny. The judiciary always must be hesitant to probe into the elements of presidential decision-making and such judicial intervention is not to be tolerated absent imperative constitutional necessity. *United States* v. *Nixon*, 418 U. S., at 709–716.[3] No such intervention is warranted in the present case, as the Court holds.

The enormous range and impact of Presidential decisions—far beyond that of any one Member of Congress—inescapably means that many persons will consider themselves aggrieved by such acts. Absent absolute immunity, every person who feels aggrieved would be free to bring a suit for damages, and each suit—especially those that proceed on the merits—would involve some judicial questioning of Presidential acts, including the reasons for the decision, how it was arrived at, the information on which it was based, and who supplied the information. Such scrutiny of day-to-day decisions of the Executive Branch would be bound to occur if civil damage actions were made available to private individuals. Although the individual who claims wrongful conduct may indeed have sustained some injury, the need to prevent large scale invasion of the Executive function by the judiciary far outweighs the need to vindicate the private claims. We have decided that in a similar sense Members of both Houses of Congress—and their aides—must be totally free from judicial scrutiny for legislative acts; the public interest, in other

[3] See also *United States* v. *Burr*, 4 Cranch 469, 507 (1807).

words, outweighs the need for private redress of one claiming injury from legislative acts of a Member or aide of a Member.[4] The Court's concern, and the even more emphatic concerns expressed by JUSTICE WHITE's dissent, over "unremedial wrongs" to citizens by a President seem odd when one compares the potential for "wrongs" which thousands of Congressional aides, prosecutors, and judges can theoretically inflict—with absolute immunity—on the same citizens for whom this concern is expressed.

Judicial intervention would also inevitably inhibit the processes of Executive Branch decision-making and impede the functioning of the Office of the President. The need to defend damage suits would have the serious effect of diverting the attention of a President from his executive duties since defending a lawsuit today—even a lawsuit ultimately found to be frivolous—often requires significant expenditures of time and money, as many former public officials have learned to their sorrow. This very case graphically illustrates the point. When litigation processes are not tightly-controlled—and often they are not—they can and are used as mechanisms of extortion. Ultimate vindication on the merits does not repair the damage.[5]

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[4] *United States* v. *Gravel*, 408 U. S. 606 (1972). The Federal Tort Claims Act of 1946 reflects this policy distinction; in it Congress waived sovereign immunity for certain damage claims, but pointedly excepted any "discretionary function or duty . . . whether or not the discretion involved be abused." 28 U. S. C. § 2680(a) (1976). Under the Act damage resulting from discretionary governmental action is not subject to compensation. See, *e. g.*, *Dalehite* v. *United States*, 346 U. S. 15 (1953). For such injuries Congress may in its discretion provide separate nonjudicial remedies such as private bills.

In this case Fitzgerald received substantial relief through the route provided by Congress: the Civil Service Commission ordered him reinstated with backpay. Joint App. 87a–88a.

[5] Judge Learned Hand described his feelings:

"After now some dozen years of experience I must say that as a litigant I should dread a lawsuit beyond almost anything else short of sickness and

I fully agree that the constitutional concept of separation of independent co-equal powers dictates that a President be immune from civil damage actions based on acts within the scope of Executive authority while in office.[4] Far from placing a President above the law, the Court's holding places a President on essentially the same footing with judges and other officials whose absolute immunity we have recognized.

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death." 3 Lectures on Legal Topics, Assn of the Bar of the City of New York 105 (1926).

[4] In footnote 27, *ante*, the Court suggests that "we need not address directly" whether Congress could create a damages action against a President. However, the Court has addressed that issue and resolved it; once it is established that the Constitution confers absolute immunity, as the Court holds today, legislative action cannot alter that result. Nothing in the Court's opinion is to be read as suggesting that a Constitutional holding of this Court can be legislatively overruled or modified. *Marbury* v. *Madison*, 1 Cranch 137 (1803).

June 14, 1982

Personal

Nixon

Dear Chief:

It might be well to respond to BRW's attempt to distinquish types of immunity on the ground of whether "a personal decision allegedly was made for unlawful reasons".

BRW says this is a kind of claim "put forward by Fitzgerald". Apparently BRW is saying that neither a judge nor prosecutor would have immunity if there were such an allegation. I can scarcely believe he is serious. Prosecutors, in particular, make personal decisions every day as to whom they will prosecute and who knows whether their reasons would be viewed as lawful if immunity turned on this! The same can be said as to judicial decisions, particularly in close cases involving personal judgments as to morality, what will be popular with the public when a judge is facing reelection, and the like.

If Nixon ordered Fitzgerald to be fired as part of personnel changes in the Defense Department, this clearly was within his Executive authority.

BRW states that you "fail to grasp [this] difference". He deserves a response, and I hope you will give him one.

Perhaps the library could find for you a case involving the prosecutor in New Orleans who was so controversial. His name was Garrison. I think we had a cert petition filed here by one of his victims who made a strong case that he had been prosecuted purely for vindictive and personal reasons.

If you elect to answer BRW, I may add a sentence at the end of the final footnote in the Court opinion making a cross reference to your response to the dissenters argument that we are elevating the President "above the law".

Sincerely,

The Chief Justice
LFP/vde

June 14, 1982

Personal

79-1738 Nixon

Dear Chief:

I must correct my letter delivered to you earlier, as I had misread one word in Byron's opinion. He used "personnel" rather than "personal". The mountain of material that we have to read induces mistakes!

You had a better perception of what Byron was saying. He overlooks the central point that the President, vested by the Constitution with the authority of the Executive Branch of government, certainly has jurisdiction over personnel matters. The scope of authority of judges and prosecutors is more limited than that of a President. Yet all three possess absolute immunity only when they act within their authority.

Sincerely,

The Chief Justice

LFP/vde

The C J "hit the ceiling" on this!

No. 79-1738, Nixon v. Fitzgerald

For insertion as a footnote on page 23, to be dropped from the citation in text to U.S. v. Nixon.

In his dissenting opinion, post, at 1, Justice BLACKMUN states he cannot "understand the Court's holding that the absolute immunity of the President is compelled by separation-of-powers concerns, when the Court at the same time expressly leaves open ... the possibility that the President nevertheless may be fully subject to congressionally-created forms of liability." The two concepts, he contends, "cannot coexist." Id., at 2. Justice BLACKMUN's argument misapprehends the balancing approach to separation-of-powers questions prescribed by such cases as Nixon v. General Services Administration, 433 U.S. 425, 443 (1977) and United States v. Nixon, 418 U.S. 683, 703-713 (1974). In the Nixon Tapes Case, for example, the Court stated that the Constitution mandated judicial recognition of an evidentiary privilege protecting the communications of the President of the United States. In language similar to that used today to describe the President's absolute immunity, we characterized that evidentiary privilege as "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." 418 U.S., at 708. Nonetheless, despite finding that the privilege was

constitutionally mandated, we held that other factors of constitutional weight could be so compelling as to overcome the privilege in a particular case. Our reservation in this case is consistent with this balancing approach. It acknowledges that action by Congress might be considered a factor of constitutional weight, which might require the Court to reexamine the balance on the constitutional scale. Cf. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-638 (1952) (Jackson, J., concurring). We do not suggest that the constitutional arguments supporting Presidential immunity would be diminished in such a case. Nor do we imply how the balance then would be struck. We simply acknowledge that explicit congressional action would confront this Court with a different case.

Iranian Arms case last Term

Possible Rider to Footnote 42, page 25.

Reaching for authority to support the dissenting position, Justice WHITE purports to derive support from a current edition of Time magazine. See n. 2 post. But the issue that he quotes does no more than report the unremarkable proposition, with which we are in full agreement, that the President is not above the law. This unusual source thus would provide legal support for the dissent only if Time should share the dissent's persistent error--that of confusing immunity from damages liability with being "above the law." The Time article of course made no reference to damages liability. Rather, its statement referred to the judgment of this Court in the Nixon tapes case and of the House Judiciary Committee in voting an impeachment resolution. The President's continuing amenability to these forms of legal process demonstrates that the President remains as much subject to the law today as ever before. The immunity we recognized ~~today~~ extends only to private suits for damages based on decisions and actions within the scope of a President's authority.

relied on ?

Dick - did Time mention Tapes Case & House Committee?

HAB

Addition of CJ's with last ~~four~~ five sentences added by me.

79-1738 Nixon v. Fitzgerald

In Justice White's note 2 he suggests - prior to today - Presidents, prosecutors, judges, congressional aides and other officials, "could have been held liable for the kind of cliam put forward by Fitzgerald - a personnel decision made for unlawful reasons." [emphasis added] This is simply not so. The law has not heretofore permitted a plaintiff to recite "magic" words and have the incantation operate to make the immunity vanish. Moreover, and more fundamentally, Justice White errs in treating all of the above named officials as if the scope of their authority were identical. The authority of a President, head of the executive branch of our government - a wholly unique office - is far broader than that of any other official. As the Court states a President has authority in the course of personnel changes in an executive department to make personnel decisions. This is not to say that, in a given case, it would not be appropriate to raise the question whether an official - even the President - had acted "within the scope of [the official's] constitutional and statutory duties". The doctrine of absolute immunity does not extend beyond such action.

ZFP

6/14

June 15, 1982

TO: MR. JUSTICE POWELL

FROM: DICK FALLON

RE: Changes in Nixon

Your letter seems perfectly appropriate. Attached are the clean copies of the two suggested additions, with your changes entered. If you want to change the format before circulating these to other Justices, either Sally or Ginny would know how to "get" the files from my Atex. Or I could make changes myself.

June 15, 1982

79-1738 Nixon v. Fitzgerald

Dear Chief, Bill, John and Sandra,

In view of Byron's additions on pages 4-5 and 30 of his opinion, and the fact that this case now will not come down until next week, I no longer can resist the temptation to respond.

One of my proposed notes addresses specifically Byron's reliance on Time magazine in his "eye-catching" note 2.

The second suggested addition is a response primarily to Harry's statement that our opinion is internally contradictory. Again, possible misunderstanding here could be clarified, by emphasizing the parallel with the Court's decision - and its rationale - in United States v. Nixon.

If you approve, I will add these notes to what I hope will be a final circulated draft.

I am grateful to each of you for "staying with me" during this long (and now boring!) process.

Sincerely,

The Chief Justice
Justice Rehnquist
Justice Stevens
Justice O'Connor

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 15, 1982

79-1738 Nixon v. Fitzgerald

Dear Chief, Bill, John and Sandra,

In view of Byron's additions on pages 4-5 and 30 of his opinion, and the fact that this case now will not come down until next week, I no longer can resist the temptation to respond.

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If you approve, I will add these notes to what I hope will be a final circulated draft.

I am grateful to each of you for "staying with me" during this long (and now boring!) process.

Sincerely,

Lewis

The Chief Justice
Justice Rehnquist
Justice Stevens
Justice O'Connor

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

PERSONAL

June 15, 1982

Re: No. 79-1738 - Nixon v. Fitzgerald

Dear Lewis:

I can't conceivably understand why you insist on reviving the issue that, between us, we have blurred. You now emphasize:

> We do not suggest that the constitutional arguments supporting Presidential immunity would be diminished in such a case. [i.e., if Congress acted]. Nor do we imply how that balance would be struck. We simply acknowledge that explicit congressional action would confront this Court with a different case.

(A different case yes, but precisely the same result.)

For me this undoes virtually all the reconciling you and I have struggled with for days now. And it is wholly unnecessary since John found my opinion acceptable.

I am unwilling to hedge on this issue as the opinion now does, and Jackson's sole view in Youngstown carries no weight with me. I would not even cite it.

Let Byron "rant" on this point but don't fall into the trap of answering him and rendering the opinion unacceptable to me.

I'm ready to talk if you wish.

Regards,

WEB

After talking to C.J.,
I abandoned this "trial
~~balloon~~ balloon". He thinks
it would undercut his concurrence.

Justice Powell

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

A. ERNEST FITZGERALD,

Plaintiff,

v.

ROBERT E. HAMPTON, et al.,

Defendants.

CIVIL ACTION NO. 76-1486

FILED

JUN 15 1982

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

SETTLEMENT AGREEMENT

The parties, through their counsel, hereby stipulate and agree as follows:

1. The United States Air Force ("Air Force") shall assign A. Ernest Fitzgerald to the position of Management Systems Deputy to the Assistant Secretary of the Air Force (Financial Management) effective June 21, 1982. The job description for this position is attached as Exhibit 1 and incorporated into this Settlement Agreement.

2. The Air Force shall in good faith assign Fitzgerald tasks and work assignments commensurate with the position of Management Systems Deputy to the Assistant Secretary of the Air Force (Financial Management) and provide him with the appropriate resources to carry out these assignments. Fitzgerald shall in good faith perform the tasks assigned to him in this position.

3. Pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, this action is dismissed with prejudice subject only to the jurisdiction of the Court to enforce the terms and conditions of this Agreement. Should any party to this Settlement Agreement believe that any other party or parties have violated any provision of the Agreement, that party may file a motion in Civil Action No. 76-1486 alleging violation of the Settlement Agreement and the Court shall entertain such application to determine its validity and whether relief is appropriate.

4. On February 8, 1984, the Air Force shall file a written report to this Court describing in detail the assignments given Fitzgerald in the position of Management Systems Deputy to the Assistant Secretary of the Air Force (Financial Management).

5. Simultaneously herewith the parties have filed a joint motion asking the Court to vacate the March 31, 1982, Memorandum and Order issued in this case. Whether this Court grants or denies this joint motion shall not affect the instant Settlement Agreement.

6. The Air Force shall pay to Fitzgerald's counsel on the date of the Court's approval of this Agreement the sum of $200,000 as attorneys' fees and costs for legal services provided plaintiff in this action. This payment shall constitute full satisfaction of any and all claims for attorneys' fees and costs, and plaintiff and his counsel hereby waive any and all claims against defendants for attorneys' fees and costs incurred in connection with these proceedings.

7. This Settlement Agreement does not constitute, and shall not be construed, as an admission of liability by the defendants nor as a concession by any party as to the correctness of any legal position or factual assertion advanced by any other party in this action.

John Bodner Jr.
JOHN BODNER, JR.

HOWREY & SIMON
1730 Pennsylvania Avenue
Washington, D.C. 20006
Tel: (202) 383-6899

R. Lawrence Dessem
R. LAWRENCE DESSEM

Attorney, Department of Justice
10th & Pennsylvania Ave., N.W.
Washington, D.C. 20530
Tel: (202) 633-5108

APPROVED

William B Bryant
UNITED STATES DISTRICT JUDGE

June 15, 1982
DATE

I. INTRODUCTION:

The incumbent of this position acts for and assists the Principal Deputy and Assistant Secretary for Financial Management as Management Systems Deputy with responsibility and authority necessary for the development of improved management controls and broader use of statistical analysis within the Air Force.

II. DUTIES AND RESPONSIBILITIES:

1. The Management Systems Deputy is responsible at the highest Air Force level for policies and procedures regarding:

(a) Integrated performance measurement, cost control and reduction

(b) Economic cost effectiveness analysis

(c) Management information and control systems

(d) Productivity enhancement and measurement

(e) Statistical programs and analysis.

(f) Cost estimating and cost analysis.

2. Provides guidance and direction to the Air Staff and the Commands for the development and/or implementation of management information and control systems, resource management systems and associated data bases.

3. Formulates, establishes and implements policies and procedures for the Air Force productivity program including development of productivity enhancement goals and necessary reporting systems.

4. Responsible for Air Force integrated performance measurement including cost control and reduction activities. This responsibility includes supervision of Air Force performance measurement activities including cost/schedules control systems criteria (C/SCSC). Responsible for development of new systems and improvements of current systems for cost control and cost reduction, for application of "should cost" and related analyses and synthesis techniques to Air Force cost estimating, and for Air Force economic cost effectiveness analysis.

5. Performs or directs analyses and reviews of Air Force operational plans, mobilization plans, programs for foreign aid and other data, upon which financial requirements for resources are based, in order to develop or direct the development of effective management control systems.

EXHIBIT 1

6. Develops policies and procedures, and monitors the implementation of Air Force statistical programs including methods of analysis and presentation.

7. Serves as an advisor to the Assistant Secretary (Financial Management) while he is appearing before congressional committees. Serves on such committees and boards as specified by the Principal Deputy/Assistant Secretary.

8. Testifies before Congressional committees when requested.

9. Assures necessary program coordination between the Department of the Air Force, Department of Defense and other government agencies.

10. Accomplishes management studies and special projects as assigned by the Principal Deputy (Financial Management) or the Assistant Secretary (Financial Management).

Supervision Exercised: Incumbent is delegated necessary authority to carry out assigned duties and has authority to utilize resources, including manpower, as required to satisfactorily discharge the duties of his office.

III. CONTROLS OVER WORK:

Reports to the Principal Deputy/Assistant Secretary (Financial Management). Supervision is limited normally to status reports furnished to the Principal Deputy/ Assistant Secretary (Financial Management) for purposes of keeping them informed and/or for further guidance and direction. Accomplishes assigned duties and responsibilities with a high degree of individual initiative and creativity. Requires a high degree of professional stature.

IV. OTHER SIGNIFICANT FACTS:

This position requires access to TOP SECRET information. Sensitive under paragraph 4b(2)(g), AFR 40-3. Incumbent has direct access to information and is authorized travel to visit Air Force field activities and contractors as necessary to perform duties described herein.

lfp/ss 06/16/82

79-1738, Nixon v. Fitzgerald

For addition at the end of footnote 42, p.25.

Reaching for authority to support the dissenting position, Justice WHITE purports to derive support from a recent edition of Time magazine. But the issue that he quotes does no more than report the unremarkable proposition, with which we are in full agreement, that the President is not above the law. This unusual source thus would provide legal support for the dissent only if Time should share the dissent's persistent error--that of confusing immunity from damages liability with being "above the law." The Time article of course made no reference to damages liability for official acts. Rather, its statement referred to the judgment of this Court in the Nixon tapes case and of the House Judiciary Committee in voting an impeachment resolution. The President's continuing amenability to these forms of legal process demonstrates that the President remains as much subject to the law today as ever before. The immunity recognized today extends only to private suits for damages based on decisions and actions within the scope of a President's authority.

June 16, 1982

79-1738 Nixon v. Fitzgerald

MEMORANDUM TO THE CONFERENCE:

I propose to add the attached paragraph at the end of footnote 42 on page 25 of the Court's opinion.

L.F.P., Jr.

ss

June 16, 1982

Dear Byron:

In taking a last look at my Nixon draft, it seems to me that the opinion is "heavier" on footnotes than I ordinarily would like an opinion to be.

Would it inconvenience you if I were to move Footnote 34 to text? I would propose simply to elevate the note--without any substantive changes--to text, probably under a subhead "C," at the end of the the last sentence on page 23.

Sincerely,

Justice White

lfp/ss

COPY

must concern himself with matters likely to "arouse the most intense feelings." *Pierson* v. *Ray*, *supra*, 386 U. S., at 554. Yet, as our decisions have recognized, it is in precisely such cases that there exists the greatest public interest in providing an official "the maximum ability to deal fearlessly and impartially with" the duties of his office. *Ferri* v. *Ackerman*, 444 U. S. 193, 203 (1979) (footnote omitted). This concern is compelling where the officeholder must make the most sensitive and far-reaching decisions entrusted to any official under our constitutional system.[32] Nor can the sheer prominence of the President's office be ignored. In view of the visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for suits for civil damages.[33] Cognizance of this personal vulnerability frequently could distract a President from his public duties, to the detriment not only of the President and his office but also the Nation that the Presidency was designed to serve.[34]

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this Court's 1971 *Bivens* decision, fewer than a handful of damages action ever were filed against the President. None appears to have proceeded to judgment on the merits.

[32] Among the most persuasive reasons supporting official immunity is the prospect that damages liability may render an official unduly cautious in the discharge of his official duties. As Judge Learned Hand wrote in *Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (CA2 1949), cert denied, 339 U. S. 949 (1950), "[t]he justification for . . . [denying recovery] is that it is impossible to know whether the claim is well founded until the case has been tried, and to submit all officials, the innocent as well as the guilty, to the burden of trial and the danger of its outcome would dampen the ardor of all but the most resolute. . . ."

[33] These dangers are significant even though there is no historical record of numerous suits against the President, since a right to sue federal officials for damages for constitutional violations was not even recognized until *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971).

[34] In defining the scope of an official's absolute privilege, this Court has recognized that the sphere of protected action must be related closely to the immunity's justifying purposes. Frequently our decisions have held that an official's absolute immunity should extend only to acts in performance of particular functions. See *Butz* v. *Economou*, 438 U. S., at

Moved to text, at page 23.

B

Courts traditionally have recognized the President's constitutional responsibilities and status as factors counselling judicial deference and restraint.[35] For example, while courts

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508–517; cf. *Imbler* v. *Pachtman*, 424 U. S., at 430–431. But the Court also has refused to draw lines finer than history and reason would support. See, *e. g.*, *Spalding* v. *Vilas*, 161 U. S., at 498 (privilege extends to all matters "committed by law to [an official's] control or supervision"); *Barr* v. *Matteo*, 360 U. S., at 575 (fact "that the action here taken was within the outer perimeter of petitioner's line of duty is enough to render the privilege applicable. . . ."); *Stump* v. *Sparkman*, 435 U. S., at 363 and n. 12 (judicial privilege applies even to acts occurring outside "the normal attributes of a judicial proceeding"). In view of the special nature of the President's constitutional office, we think it appropriate to extend to him absolute immunity from damages actions based on acts within the "outer perimeter" of the area of his official responsibility.

Under the Constitution and laws of the United States the President has discretionary responsibilities in a broad variety of areas, many of which are highly sensitive. In many cases it would be difficult to determine which Presidential "function" encompassed a particular action. In this case, for example, respondent argues that he was dismissed in retaliation for his testimony to Congress—a violation of 5 U. S. C. § 7211 and 18 U. S. C. § 1505. The Air Force, however, has claimed that the underlying reorganization was undertaken to promote efficiency. Assuming that the petitioner Nixon ordered the reorganization in which respondent lost his job, an inquiry into the President's motives could not be avoided under the "functional" theory asserted both by respondent and the dissent. Thus, in order to administer functional distinctions among Presidential actions, judges frequently would need to inquire into the purpose for which acts were taken. Inquiries of this kind could be highly intrusive.

Here respondent argues that petitioner Nixon would have acted outside the perimeter of his duties by ordering the discharge of respondent Fitzgerald, who was lawfully entitled to retain his job in the absence of "such cause as will promote the efficiency of the service." Brief for Respondent 39, citing 5 U. S. C. § 7512(a). Because Congress has granted this legislative protection, respondent argues, no federal official could, within his authority, cause Fitzgerald to be dismissed without satisfying this standard of proof in prescribed statutory proceedings.

This construction of the President's authority would subject him to trial

moved to text at page 23

generally have looked to the common law to determine the scope of an official's evidentiary privilege,[35] we have recognized that the Presidential privilege is "rooted in the separation of powers under the Constitution." *United States* v. *Nixon*, 418 U. S. 683, 708 (1974). It is settled law that the separation of powers doctrine does not bar every exercise of jurisdiction over the President of the United States. See, *e. g.*, *United States* v. *Nixon*, *supra*; *United States* v. *Burr*, 25 Fed. Cases 191, 196 (1807); cf. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952).[37] But our cases also have established that a court, before exercising jurisdiction, must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch. See *Nixon* v. *General*

moved to text, at page 23

on every allegation that an allegedly tortious action was taken for a forbidden purpose. Adoption of this construction thus would deprive absolute immunity of its intended effect.

It clearly is within the President's authority to "prescribe" the manner in which the Secretary will "conduct the business" of the Air Force. 10 U. S. C. § 8012(b). Because this mandate includes the authority to prescribe reorganizations and reductions in force, petitioner's alleged wrongful acts lay well within the outer perimeter of his authority.

[35] This tradition can be traced far back into our constitutional history. See, *e. g.*, *Mississippi* v. *Johnson*, 71 U. S. 475, 501 (1866), ("[W]e are fully satisfied that this court has no jurisidiction of a bill to enjoin the President in the performance of his official duties; and that no such bill ought to be received by us."); *Kendall* v. *United States*, 12 Pet. 524, 610 (1838) ("The executive power is vested in a President; and as far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeaching power.").

[36] See *United States* v. *Reynolds*, 345 U. S. 1, 6–7 (1953) (Secretary of the Air Force); *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 323–324 (DDC 1966), aff'd, 384 F. 2d 979 (CADC), cert denied, 389 U. S. 952 (1967) (Department of Justice officials).

[37] Although the President was not a party, the Court enjoined the Secretary of Commerce from executing a direct Presidential order. See 343 U. S., at 583.

Services Administration, 433 U. S. 425, 443 (1977); *United States* v. *Nixon*, 418 U. S. 683, 703–713 (1974). When judicial action is needed to serve broad public interests—as when the Court acts, not in derogation of the separation of powers, but to maintain their proper balance, cf. *Youngstown Sheet & Tube Co.* v. *Sawyer*, *supra*, or to vindicate the public interest in an ongoing criminal prosecution, see *United States* v. *Nixon*, *supra*—the exercise of jurisdiction has been held warranted. In the case of this merely private suit for damages based on a President's official acts, we hold it is not.[38]

Insert footnote 34 here, as subpart "C" of text

[38] The Court has recognized before that there is a lesser public interest in actions for civil damages than, for example, in criminal prosecutions. See *United States* v. *Gillock*, 445 U. S. 360, 371–373 (1980); cf. *United States* v. *Nixon*, 418 U. S., at 711–712 and n. 19 (basing holding on special importance of evidence in a criminal trial and distinguishing civil actions as raising different questions not presented for decision). It never has been denied that absolute immunity may impose a regrettable cost on individuals whose rights have been violated. But, contrary to the suggestion of JUSTICE WHITE's dissent, it is not true that our jurisprudence ordinarily supplies a remedy in civil damages for every legal wrong. The dissent's objections on this ground would weigh equally against absolute immunity for any official. Yet the dissent makes no attack on the absolute immunity recognized for judges and prosecutors.

Our implied-rights-of-action cases identify another area of the law in which there is not a damages remedy for every legal wrong. These cases establish that victims of statutory crimes ordinarily may not sue in federal court in the absence of expressed congressional intent to provide a damages remedy. See, *e. g.*, *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, —— U. S. —— (1982); *Middlesex County Sewerage Auth.* v. *National Sea Clammers Assn.*, 453 U. S. 1 (1981); *California* v. *Sierra Club*, 451 U. S. 287 (1981). JUSTICE WHITE does not refer to the jurisprudence of implied rights of action. Finally, the dissent undertakes no discussion of cases in the *Bivens* line in which this Court has suggested that that there would be no damages relief in circumstances "counselling hesitation" by the judiciary. See *Bivens* v. *Six Unknown Federal Agents*, 403 U. S., at 396; *Carlson* v. *Green*, 446 U. S., at 19 (in direct constitutional actions against officials with "independent status in our constitutional scheme . . . judicially created remedies . . . might be inappropriate").

Even the case on which JUSTICE WHITE places principal reliance,

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 16, 1982

79-1738 Nixon v. Fitzgerald

MEMORANDUM TO THE CONFERENCE:

I propose to add the attached paragraph at the end of footnote 42 on page 25 of the Court's opinion.

L.F.P.

L.F.P., Jr.

ss

Lewis - I strongly object to any footnote which suggests that a statement from Time magazine merits any discussion in an opinion such as yours. Time's statements may be important in a libel action - apart from that, I would not so dignify them.

WEB

lfp/ss 06/16/82

79-1738, Nixon v. Fitzgerald

For addition at the end of footnote 42, p.25.

Reaching for authority to support the dissenting position, Justice WHITE purports to derive support from a recent edition of Time magazine. But the issue that he quotes does no more than report the unremarkable proposition, with which we are in full agreement, that the President is not above the law. This unusual source thus would provide legal support for the dissent only if Time should share the dissent's persistent error--that of confusing immunity from damages liability with being "above the law." The Time article of course made no reference to damages liability for official acts. Rather, its statement referred to the judgment of this Court in the Nixon tapes case and of the House Judiciary Committee in voting an impeachment resolution. The President's continuing amenability to these forms of legal process demonstrates that the President remains as much subject to the law today as ever before. The immunity recognized today extends only to private suits for damages based on decisions and actions within the scope of a President's authority.

Nixon

July 20, 1982

Re: Nos. 79-1738 and 80-945, Nixon and Harlow

Dear Al,

Thank you for your letter of July 7, that finally reached me here in Richmond.

Justice White and I both agree with your recommendation to apportion the total printing costs two-thirds to Fitzgerald and one-third to Harlow and Butterfield.

I have initialed and return the Orders to this effect.

Sincerely,

Enclosures:
Orders

The Hon.
Alexander L. Stevas, Esquire
Clerk
Supreme Court of the United States
1 First Street, N. E.
Washington, D. C. 20543

cc: Mr. Justice White
United States Supreme Court
1 First Street, N. E.
Washington, D. C. 20543

djb

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 23, 1982

Memorandum to the Conference

Cases Held for No. 79-1738, Nixon v. Fitzgerald, or No. 80-945, Harlow v. Fitzgerald

No. 81-469, Bush v. Lucas

In 1975, while working for NASA, the petitioner criticized the management of his branch of the NASA program. An adverse personnel action ensued, and petitioner suffered a demotion. Following an initial denial of administrative relief, petitioner ultimately won reinstatement and back pay from the Civil Service Commission. In the meantime, however, he had instituted this damages action against respondent, his administrative superior. The suit alleged a conspiracy to deprive petitioner of First Amendment rights. The district court summarily dismissed the action, and CA5 affirmed on the ground that Congress had provided an alternative remedy under the Civil Service Act. This Court then vacated and remanded for reconsideration in light of Carlson v. Green, 446 U.S. 14 (1980). 446 U.S. 914. On the remand CA5 reaffirmed the decision to grant summary judgment. This time it found that "the unique relationship between the Federal Government and its civil service employees is a special consideration which counsels hesitation in inferring a Bivens remedy in the absence of affirmative congressional action." The panel also noted that inferring a Bivens remedy might encourage employees to bypass congressionally created administrative remedies in favor of judicial relief.

The petitioners in No. 80-945, Harlow v. Fitzgerald, also argued that the respondent's capacity as a government employee represented a "special factor" defeating his claim to a Bivens cause of action under the First Amendment. But the Court did not reach that issue in Harlow. Nor would the circulating opinion in No. 80-1074, Velde v. National Black Police Assn., necessarily be dispositive. The four-member majority in that case relies on a cumulation of factors not all present here.

The question raised is an important one. Moreover, the CA5 deicision in this case is in conflict with the decision of CA7 in Sonntag v. Dooley, 650 F.2d 904 (1981).

I will vote to GRANT.

No. 81-872, Turner v. Jordan

The question here is whether the Director of the Central Intelligence Agency is absolutely immune from damages liability for dismissing a CIA employee. The employee was dismissed following his public criticism of the Agency's personnel practices. His suit in the District Court alleged a violation of costitutional rights under the First and Fifth Amendments. Ruling on petitioner's claim of absolute immunity, the District Court stated that absolute immunity might be proper where "defense of a constitutional tort action requires the disclosure of classified information." Here, however, the District Court found that "the defendants have acknowledged that this case involves no such issue of secrecy or security." App. 21a. The District Court certified the case for interlocutory appeal under the collateral order doctrine. CADC (Tamm, Robb, Edwards) affirmed without opinion.

Harlow, No. 80-945, holds open the possibility that federal officials might be entitled to absolute immunity in connection with performance of functions "so sensitive as to require a total shield from liability." Slip op., at 12. Under Harlow, petitioner thus could establish entitlement to absolute immunity in this case if he could "demonstrate that he was discharging a protected function when performing the act for which liability is asserted." Ibid. Here, as noted, the District Court has found that the case involves no issue of "secrecy or security." Nonetheless, the Solicitor General argues that the special functions of the CIA director require an absolute immunity applicable to all personnel actions. Nothing in Harlow suggests that the special status of the CIA director might not raise a unique and unsettled question. But this question--which does seem to me to be unique--of course could be mooted by a decision of the question presented in Bush v. Lucas, supra. If government employment generally constitutes a special factor precluding inference of a Bivens action for adverse personnel actions, that rationale would apply a fortiori to suits against the Director of the CIA. Assuming that the Court will vote to grant in Bush v. Lucas, supra, I will vote to Hold this case for No. 81-469.

No. 81-1010, Purtill v. Schweiker

Petitioner is a 53-year-old employee of HHS. When his superiors failed to promote him, he filed suit in federal court, alleging age discrimination. His complaint based one count on a federal statute, the Age Discrimination in Employment Act (ADEA), and one directly on the Constitution. The District Court dismissed the Bivens count--which alone is here--on grounds that it was preempted by the ADEA. See Carlson v. Green, supra. CA3 agreed.

In this Court there are two possible questions presented for decision. The first is the same as that presented in No. 81-469, Bush v. Lucas. That is whether the government's employment relationship with an employee is a "special factor counseling hesitation" in the inference of a Bivens action. The other is whether the ADEA preempts a Bivens action that might otherwise exist. See Carlson v. Green, 446 U.S. 14, 18-19 (1980). There appears to be a split on the second question. See Sonntag v. Dooley, 650 F.2d 904 (CA7 1981) (upholding Bivens claim by a former federal employee asserting age discrimination by her superiors).

The preemption argument in this case, based on the ADEA, appears to be stronger than that made under the general civil service laws in Bush v. Lucas, supra. Yet the Bush issue--whether federal employment is a special factor precluding Bivens actions for employment decisions--is the broader and more important issue. Viewing the "special factor" question as the one the Court should reach first, I would be inclined to Hold this case if Bush is granted.

Alternatively, I could vote to Grant this case and consolidate it for argument with Bush, supra, No. 81-469.

No. 81-1134, Ashcroft v. National Org. for Women, Inc.

The petitioner in this case is the Attorney General of Missouri. In that capacity he joined other state Attorneys General in bringing an antitrust action against respondent for its convention boycott of States that had not ratified the ERA. Following dismissal of that action, respondent sued petitioner under § 1983. Petitioner claimed absolute immunity from suit, asserting that prosecutorial immunity extended to his initiation of a civil action on behalf of the State. Resondent claimed that petitioner's actions in arranging for the filing of the civil action all occurred in an executive capacity. The District Court denied petitioner's immunity claim without opinion, and CA8, in a brief per curiam order, concluded that the order appealed

from was not final within the meaning of 28 U.S.C. § 1291 and thus not appealable.

In No. 79-1738, United States v. Nixon, the Court reaffirms that orders denying absolute immunity are appealable collateral orders under Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). Respondent argues that there can be no conflict with this or other cases, because the collateral order doctrine is inherently flexible and not mandatory. But CA8 did not put its decision on this basis. It appears to have held as a matter of law that there was no appealable, because not "final," order. Because our Nixon decision is incompatible with that of CA8 in this respect, I am inclined to vote to GV & R in light of No. 79-1738.

No. 81-1580, Sanborn v. Wolfel

The petitioners in this § 1983 suit are parole officers. As a parolee under their supervision, respondent was arrested for intoxication. He subsequently forfeited bond when he failed to appear for a scheduled hearing. Upon receipt of this and other information, petitioners took respondent into custody for parole violations. There was no on-site hearing to determine whether there was probable cause to revoke his parole, as apparently should have been held under our decision in Morrissey v. Brewer, 408 U.S. 471 (1972). After he was released from incarceration 27 days after his arrest, respondent brought suit against petitioners under § 1983, alleging a violation of due process under Morrissey. A jury awarded damages of $1,000. On appeal, CA6 rejected petitioners' argument that the trial court had erred in imposing on them the burden of proving that they had acted in good faith. And, after reviewing the record, the CA found that the jury reasonably could have found that petitioners did not act in subjective good faith. As evidence of bad faith, the CA appears to have relied on evidence that petitioners arrested respondent not in response to parole violations, but to secure his detention while more serious charges were investigaged. Judge Weick dissented. He argued that the petitioners indisputably had acted in accordance with the policies of the Audit Parole Authority of Ohio and approved as lawful by the Attorney General of Ohio. That policy was not to hold on-site hearings where the parolee had jumped bail for an offense committed while on parole. As laymen, petitioners were entitled to rely on the policy adopted by their employer.

The Court opinion in No. 80-945, Harlow v. Fitzgerald, holds that an official is entitled to good faith immunity insofar as his conduct does not violate "clearly established

constitutional or statutory rights of which a reasonable person would have known." Slip op., at 17. Harlow further provides that an official may establish entitlement to good faith immunity where he can prove that he neither knew nor should have known of the relevant legal standard. In light of petitioner's claimed reliance on established Ohio procedures, the immunity inquiry in this case may be in tension with Harlow's reformulated standard.

Unlike Harlow, however, this case arises under § 1983, and thus presents a technically unsettled question: whether the Harlow standard should be applied to cases under that statute. But see Slip. Op., at 17, and n. 30 (suggesting any distinction would be untenable).

I believe that the Harlow standard should be applicable here. I therefore will vote to Grant, Vacate, and Remand in light of No. 80-945, Harlow v. Butterfield. A judgment order in this case might read as follows:

> "The petition is Granted. The judgment is vacated and the case remanded for reconsideration in light of No. 80-945, Harlow v. Butterfield. See Butz v. Economou, 438 U.S. 478, 504 (1978) (deeming it "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under the § 1983 and suits brought directly under the Constitution against federal officials").

L.F.P.

L.F.P., Jr.

This is a private suit by respondent Fitzgerald to recover damages from former President Nixon for allegedly conspiring unlawfully to cause respondent's dismissal from a government position.

The question presented, not heretofore decided by this Court, is the extent of a President's immunity when sued for damages. Respondent sought damages under two federal statutes, neither of which expressly creates a damages remedy, and under the First Amendment to the Constitution.

Our decisions have recognized two types of immunity defenses: "qualified" and "absolute". Prior cases establish that qualified immunity is the standard generally applicable to executive officials, whether state or federal.

Absolute immunity is expressly conferred by the Constitution on members of Congress and their aides, in the performance of legislative acts. Our decisions also have established absolute immunity as a defense for judges and prosecuting attys

prosecuting attorneys for action in the course of their official functions.

The District Court denied petitioner's claim of absolute immunity. And the Court of Appeals for the District of Columbia dismissed his appeal. We granted certiorari, and now reverse.

We hold that a President is entitled to absolute immunity from civil damages liability in suits based on his official acts. We think this immunity is incident to a President's constitutional office, rooted in the separation of powers and supported by our history. Until recently civil damage suits against a President were unknown.

The President occupies a unique position in the constitutional scheme. Article II of the Constitution vests the entire "executive power" of the United States in the President. His responsibilities include the management of the Executive Branch, the enforcement of all federal law, the conduct of foreign affairs, and the defense of our country. He is required - sometimes almost daily - to make decisions of the utmost discretion and senstivity.

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We think it would be intolerable, and contrary to the public interest, if each such decision were made in the shadow of threatened damages suit by employees or citizens who feel aggrieved.

A rule of absolute immunity will not leave the nation without adequate protection against serious misconduct by the chief executive. In the Nixon tapes case, we compelled a President to make evidence in his possession available in a criminal prosecution.

The constitutional remedy of impeachment, of course, remains available. Moreover, pervasive oversight by Congress and the media ~~more pervasive than with respect to any other official~~ normally will serve to deter presidential abuse of office.

In conclusion, I emphasize the narrowness of our holding. It applies only to private damage suits, and only to action taken within the scope of a President's official authority. The President, like judges and prosecutors, is not immune for acts outside of his official duties.

The C J has filed a con. opinion

J. White, a dissenting op.
J. Brennan, Marshall + Blackmun

J Blackmun, also d/op. in which
J Bren & Marshall

The Chief Justice has filed a concurring opinion. Justice White has filed a dissenting opinion in which Justices Brennan, Marshall and Blackmun join. Justice Blackmun also has filed a dissenting opinion, in which Justices Brennan and Marshall join.

June 24, 1982

Nixon and Harlow

Dear John,

This is merely to say "thank you" with warmth and appreciation.

You were a helpful and steadfast supporter through two long Terms of struggle with these cases.

As ever,

Justice Stevens

lfp/ss

SOC

copy to Mr Lind 5/31

THE C. J.	W. J. B.	[redacted]	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P.
						12/14/81		
memo 3/31/82	Join BLW 5/27/82	Join LFP 3/29/82	will dissent 3/22/82	Join BLW 5/12/82	Join BLW 5/31/82	1st Draft 3/17/82 2nd draft	Join LFP 4/5/82	Join 3/18/
dissent 1st draft 4/22/82	[redacted] Join HAB 6/1/82		1st Draft 5/11/82 2nd Draft	Join HAB 6/2/82	typed Draft dissent 5/31/82	3/29/82 3rd Draft 5/26/82		
will circulate revised concurring opinion 6/2/82			5/31/82 3rd Draft 6/9/82		1st Draft 6/1/82	4th Draft 6/3/82 5th Draft 6/10/82		
2nd Draft 6/3/82			4th Draft 6/10/82 5th Draft 6/14/82		2nd Draft 6/4/82	6th Draft 6/21/82		
Join LFP 6/11/82 Con opinion			6th Draft 6/22/82					
3rd Draft 4th Draft 6/16/82								
4th Draft 6/22/82				79-1738 Nixon v. Fitzgerald				

Excerpts From Decision on Presidential Immunity

Special to The New York Times

WASHINGTON, June 24 — Following are excerpts from the Supreme Court's ruling today giving the President absolute immunity from civil suits for damages. Associate Justice Lewis F Powell wrote the majority opinion, and Associate Justice Byron R. White filed a dissenting opinion.

By Justice Powell

The issue before us is the scope of the immunity possessed by the President of the United States.

This Court has recognized that government officials are entitled to some form of immunity from suits for civil damages.

In Butz v. Economou (1978), the Court rejected an argument that all high Federal officials have a right to absolute immunity from constitutional damage actions. In so doing we reaffirmed our holdings that some officials, notably judges and prosecutors, because of the special nature of their responsibilities, require a full exemption from liability.

This case now presents the claim that the President of the United States is shielded by absolute immunity from civil damages liability. This inquiry involves policies and principles that may be considered implicit in the nature of the President's office in a system structured to achieve effective government under a constitutionally mandated separation of powers.

Absence of Legislative Action

Here a former President asserts his immunity from civil damages claims of two kinds. He stands named as a defendant in a direct action under the Constitution and in two statutory actions under Federal laws of general applicability. In neither case has Congress taken express legislative action to subject the President to civil liability for his official acts. Consequently, our holding today need only be that the President is absolutely immune from civil damages liability for his official acts in the absence of explicit affirmative action by Congress. We decide only this constitutional issue, which is necessary to disposition of the case before us.

We consider this immunity a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history.

The President occupies a unique position in the constitutional scheme. Article II of the Constitution provides that "the executive power shall be vested in a President of the United States."

In arguing that the President is entitled only to qualified immunity, the respondent relies on cases in which we have recognized immunity of this scope for governors and Cabinet officers. We find these cases to be inapposite. The President's unique status under the Constitution distinguishes him from other executive officials.

'An Easily Identifiable Target'

Because of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government. Nor can the sheer prominence of the President's office be ignored. In view of the visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for suits for civil damages. Cognizance of this personal vulnerability frequently could distract a President from his public duties, to the detriment not only of the President and his office but also the nation that the Presidency was designed to serve.

It is settled law that the separation of powers doctrine does not bar every exercise of jurisdiction over the President of the United States. But our cases also have established that a court, before exercising jurisdiction, must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the executive branch. When judicial action is needed to serve broad public interest — as when the Court acts, not in derogation of the separtion of powers but to maintain their proper balance, cf. Youngstown Sheet & Tube Co. v. Sawyer [the 1952 steel seizure case], or to vindicate the public interest in an ongoing criminal prosecution, see United States v. Nixon [the 1974 Watergate tapes case] — the exercise of jurisdiction has been held warranted. In the case of this merely private suit for damages based on a President's official acts, we hold it is not.

In view of the special nature of the President's constitutional office and functions, we think it appropriate to recognize absolute Presidential immunity from damages liability for acts within the "outer perimeter" of his official responsibility.

Protecion Against Misconduct

Here respondent argues that petitioner Nixon would have acted outside the outer perimeter of his duties by ordering the discharge of an employee who was lawfully entitled to retain his job. This construction would subject the President to trial on virtually every allegation that an action was unlawful or was taken for a forbidden purpose. Adoption of this construction thus would deprive absolute immunity of its intended effect. We conclude that petitioner's alleged wrongful acts lay well within the outer perimeter of his authority.

A rule of absolute immunity for the President will not leave the nation without sufficient protection against misconduct on the part of the chief executive. There remains the constitutional remedy of impeachment. In addition, there are formal and informal checks on Presidential action that do not apply with equal force to other executive officials. The President is subject to constant scrutiny by the press. Vigilant oversight by Congress also may serve to deter Presidential abuses of office, as well as to make credible the threat of impeachment. Other incentives to avoid misconduct may include a desire to earn re-election, the need to maintain prestige as an element of Presidential influence and a President's traditional concern for his historical stature.

The existence of alternative remedies and deterrents establishes that absolute immunity will not place the President "above the law." For the President, as for judges and prosecutors, absolute immunity merely precludes a particular private remedy for alleged misconduct in order to advance compelling public ends.

By Justice White, Dissenting

I do not agree that if the office of President is to operate effectively, the holder of that office must be permitted, without fear of liability and regardless of the function he is performing, deliberately to inflict injury on others by conduct that he knows violates the law.

In Marbury v. Madison (1803), the Court observed that while there were

"important political powers" committed to the President for the performance of which neither he nor his appointees were accountable in court, "the question, whether the legality of the act of the head of a department be examinable in a court of justice or not, must always depend on the nature of the act."

The Court nevertheless refuses to follow this course with respect to the President. It makes no effort to distinguish categories of Presidential conduct that should be absolutely immune from other categories of conduct that should not qualify for that level of immunity. The Court instead concludes that whatever the President does and however contrary to law he knows his conduct to be, he may, without fear of liability, injure Federal employees or any other person within or without the Government.

Attaching absolute immunity to the office of the President, rather than to particular activities that the President might perform, places the President above the law. It is a reversion to the old notion that the king can do no wrong.

'A Frivolous Contention'

The Court casually, but candidly, abandons the functional approach to immunity that has run through all of our decisions. Indeed, the majority turns this rule on its head by declaring that because the functions of the President's office are so varied and diverse and some of them so profoundly important, the office is unique and must be clothed with office-wide, absolute immunity. This is policy, not law, and in my view, very poor policy.

The suggestion that enforcement of the rule of law — i.e., subjecting the President to rules of general applicability — does not further the separation of powers, but rather is in derogation of this purpose, is bizarre. Regardless of what the Court might think of the merits of Mr. Fitzgerald's claim, the idea that pursuit of legal redress offends the doctrine of separation of powers is a frivolous contention passing as legal argument. It cannot be seriously argued that the President must be placed beyond the law and beyond judicial enforcement of constitutional restraints upon executive officers in order to implement the principle of separation of powers.

The majority may be correct in its conclusion that "a rule of absolute immunity will not leave the nation without sufficient remedies for misconduct on the part of the chief executive." The remedies in which the Court finds comfort were never designed to afford relief for individual harms. Rather, thay were designed as political safety valves. Politics and history, however, are not the domain of the courts; the courts exist to assure each individual that he, as an individual, has enforceable rights that he may pursue to achieve a peaceful redress of his legitimate grievances.

I find it ironic, as well as tragic, that the Court would so casually discard its own role of assuring "the right of every individual to claim the protection of the laws" (Marbury v. Madison), in the name of protecting the principle of separation of powers.

Court Rules for Nixon, 5-4

Presidents Given Immunity From Suits

By Fred Barbash
Washington Post Staff Writer

A bitterly divided Supreme Court ruled yesterday that presidents may not be sued for monetary damages even if they break the law or violate citizens' constitutional rights.

The 5-to-4 decision, sought by former president Richard M. Nixon after being sued by one-time Pentagon cost analyst A. Ernest Fitzgerald, created an absolute presidential immunity from civil damages suits and, the majority said, from the inhibiting and time-consuming results of the thousands of such suits that could be brought against a chief executive.

The court refused to similarly shield top aides to the president, ruling in a complaint brought by Fitzgerald against Nixon aides Bryce N. Harlow and Alexander P. Butterfield.

Justice Byron R. White, writing the dissent on the Nixon ruling, called Justice Lewis F. Powell Jr.'s majority opinion on presidential immunity "tragic." It "is a reversion to the old notion that the king can do no wrong," he said. It "places the president above the law." Justices William J. Brennan Jr., Thurgood Marshall and Harry A. Blackmun joined White in dissent.

In the course of ruling on the two complaints yesterday, the court made another major change in laws designed to deter official misconduct: the justices, apparently in reaction to thousands of damages claims now swamping state, local and federal officials as well as police officers, gave judges new authority to weed out frivolous or insubstantial suits without requiring lengthy and costly trials.

Trials will be permitted only where a judge agrees that a "clearly established" breach of a law or constitutional right is involved, the court said in an 8-to-1 vote on *Harlow vs. Fitzgerald.*

Fitzgerald was the analyst with the Air Force who drew national attention as "the Pentagon whistle blower" when he testified before a Senate subcommittee in 1968 con-

See COURT, A6, Col. 1

Presidents Get Immunity From Suits

COURT, From A1

cerning $2 billion in cost overruns and unexpected technical difficulties on the C5A transport plane.

The Nixon administration eliminated Fitzgerald's job in 1970, claiming his removal was only part of an Air Force reorganization. At a 1973 news conference, Nixon took personal credit for Fitzgerald's dismissal: "It was a decision that was submitted to me," the president said on Jan. 31, 1973. "I made it and I stick by it."

Nixon later retracted the comment. But Fitzgerald sued him for damages in 1978 for violating his free speech rights, adding the former president as a defendant to the suit he had already brought against the two Nixon White House aides he said participated in the decision, Butterfield and Harlow.

Nixon claimed total immunity as president from such suits. Harlow and Butterfield claimed that they shared that immunity. The U.S. Court of Appeals for the District of Columbia rejected all the claims, just as it had earlier in a suit brought against Nixon, Henry A. Kissinger and others by former National Security Council staffer Morton Halperin.

The immunity granted by the court yesterday extends to all "official" acts of the president. But Powell disputed the contention that he was placing the president "above the law," saying that there are still adequate deterrents to presidential misconduct, including impeachment. He noted that, as in the Watergate tapes case, the president could be subjected to subpoenas, to "constant scrutiny by the press" and to "vigilant oversight" by Congress.

At the same time, he said the Constitution, in its separation of powers provisions, requires that the chief executive be allowed to exercise his powers. "The president's unique status under the Constitution distinguishes him from other executive officials," Powell said. "Because of the singular importance of the president's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government."

The chief executive now joins a select group of officials immunized by the Supreme Court, including Supreme Court justices, other judges and prosecutors. The Constitution explicitly protects members of Congress from having to answer in the courts for official decisions. Presidential immunity, under Powell's ruling, appeared to be even broader than theirs, reaching, as he put it, to "the outer perimeter" of the presidency.

The court has extended much less protection to all other public officials ranging from Cabinet officers to police officers to dog catchers. They may not be sued for actions taken in "good faith."

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... calls immunity decision frightening

In ruling on the Harlow and Butterfield case, the court said they and other top presidential aides ordinarily enjoy only that same "good faith" immunity that protects the other officials.

Except in special circumstances, perhaps involving foreign policy or national security decisions and where they function as "alter egos" of the president, these top-level White House assistants should be treated like Cabinet members, Powell said.

But in an important victory for these aides and holders of public office everywhere, the court radically altered the definition of "good faith." In the past, they lost their protection if they acted "with malicious intention" to break a law or violate a citizen's rights. Powell said that was too subjective and often resulted in trials or lengthy and expensive fact-gathering expeditions just to resolve the immunity issue.

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Some justices thought the issue should have been left unresolved again this term, because of an out-of-court settlement between Nixon and Fitzgerald. Under that agreement Nixon agreed to pay $142,000 to Fitzgerald in exchange for the dropping of the suit. Nixon agreed to pay Fitzgerald another $28,000 should Fitzgerald win the immunity issue at the Supreme Court. Thus, no matter how the court ruled yesterday, there would be no trial of Nixon under the agreement.

Blackmun, with Brennan and Marshall, called this a "wager" yesterday, which, they said, made the case inappropriate for review.

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Extra full

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Washington Post researcher Carin Pratt contributed to this article.

'The President Would Be an Easily Identifiable Target for Suits'

Excerpts from the majority opinion of Justice Lewis F. Powell Jr. in the case of Nixon vs. Fitzgerald:

Applying the principles of our cases to claims of this kind, we hold that petitioner, as a former president of the United States, is entitled to absolute immunity from damages liability predicated on his official acts. We consider this immunity a functionally mandated incident of the president's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history . . . .

The president's unique status under the Constitution distinguishes him from other executive officials.

Because of the singular importance of the president's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government. As is the case with prosecutors and judges—for whom absolute immunity is now established—a president must concern himself with matters likely to "arouse the most intense feelings." Yet, as our decisions have recognized, it is in precisely such cases that there exists the greatest public interest in providing an official "the maximum ability to deal fearlessly and impartially with" the duties of his office.

This concern is compelling where the officeholder must make the most sensitive and far-reaching decisions entrusted to any official under our constitutional system. Nor can the sheer prominence of the president's office be ignored.

In view of the visibility of his office and the effect of his actions on countless people, the president would be an easily identifiable target for suits for civil damages. Cognizance of this personal vulnerability frequently could distract a president from his public duties, to the detriment not only of the president and his office but also the nation that the presidency was designed to serve . . . .

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The president is subjected to constant scrutiny by the press. Vigilant oversight by Congress also may serve to deter presidential abuses of office, as well as to make credible the threat of impeachment.

Other incentives to avoid misconduct may include a desire to earn reelection, the need to maintain prestige as an element of presidential influence, and a president's traditional concern for his historical stature . . . .

Excerpts from the dissent of Justice Byron R. White.

Attaching absolute immunity to the office of the president, rather than to particular activities that the president might perform, places the president above the law. It is a reversion to the old notion that the king can do no wrong. Until now, this concept had survived in this country only in the form of sovereign immunity. That doctrine forecloses suit against the government itself and against government officials, but only when the suit against the latter actually seeks relief against the sovereign.

Suit against an officer, however, may be maintained where it seeks specific relief against him for conduct contrary to his statutory authority or to the Constitution. Now, however, the court clothes the office of the president with sovereign immunity, placing it beyond the law . . . .

The scope of immunity is determined by function, not office. The wholesale claim that the president is entitled to absolute immunity in all of his actions stands on no firmer ground than did the claim that all presidential communications are entitled to an absolute privilege, which was rejected in favor of a functional analysis, by an unanimous court in *United States vs. Nixon, supra* . . . .

The majority may be correct in its conclusion that "a rule of absolute immunity will not leave the nation without sufficient remedies for misconduct on the part of the chief executive."

Such a rule will, however, leave Mr. Fitzgerald without an adequate remedy for the harms that he may have suffered. More importantly, it will leave future plaintiffs without a remedy, regardless of the substantiality of their claims.

The remedies in which the court finds comfort were never designed to afford relief for individual harms. Rather, they were designed as political safety-valves. Politics and history, however, are not the domain of the courts; the courts exist to assure each individual that he, as an individual, has enforceable rights that he may pursure to achieve a peaceful redress of his legitimate grievances.

I find it ironic, as well as tragic, that the court would so casually discard its own role of assuring "the right of every individual to claim the protection of the laws," *Marbury vs. Madison*, in the name of protecting the principle of separation of powers. Accordingly, I dissent.

'The President Would Be an Easily Identifiable Target for Suits'

Excerpts from the majority opinion of Justice Lewis F. Powell Jr. in the case of Nixon vs. Fitzgerald:

Applying the principles of our cases to claims of this kind, we hold that petitioner, as a former president of the United States, is entitled to absolute immunity from damages liability predicated on his official acts. We consider this immunity a functionally mandated incident of the president's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history . . . .

The president's unique status under the Constitution distinguishes him from other executive officials.

Because of the singular importance of the president's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government. As is the case with prosecutors and judges—for whom absolute immunity is now established—a president must concern himself with matters likely to "arouse the most intense feelings." Yet, as our decisions have recognized, it is in precisely such cases that there exists the greatest public interest in providing an official "the maximum ability to deal fearlessly and impartially with" the duties of his office.

This concern is compelling where the officeholder must make the most sensitive and far-reaching decisions entrusted to any official under our constitutional system. Nor can the sheer prominence of the president's office be ignored.

In view of the visibility of his office and the effect of his actions on countless people, the president would be an easily identifiable target for suits for civil damages. Cognizance of this personal vulnerability frequently could distract a president from his public duties, to the detriment not only of the president and his office but also the nation that the presidency was designed to serve . . . .

A rule of absolute immunity for the president will not leave the nation without sufficient protection against misconduct on the part of the chief executive. There remains the constitutional remedy of impeachment. In addition, there are formal and informal checks on presidential action that do not apply with equal force to other executive officials.

The president is subjected to constant scrutiny by the press. Vigilant oversight by Congress also may serve to deter presidential abuses of office, as well as to make credible the threat of impeachment.

Other incentives to avoid misconduct may include a desire to earn reelection, the need to maintain prestige as an element of presidential influence, and a president's traditional concern for his historical stature . . . .

Excerpts from the dissent of Justice Byron R. White.

Attaching absolute immunity to the office of the president, rather than to particular activities that the president might perform, places the president above the law. It is a reversion to the old notion that the king can do no wrong. Until now, this concept had survived in this country only in the form of sovereign immunity. That doctrine forecloses suit against the government itself and against government officials, but only when the suit against the latter actually seeks relief against the sovereign.

Suit against an officer, however, may be maintained where it seeks specific relief against him for conduct contrary to his statutory authority or to the Constitution. Now, however, the court clothes the office of the president with sovereign immunity, placing it beyond the law . . . .

The scope of immunity is determined by function, not office. The wholesale claim that the president is entitled to absolute immunity in all of his actions stands on no firmer ground than did the claim that all presidential communications are entitled to an absolute privilege, which was rejected in favor of a functional analysis, by an unanimous court in *United States vs. Nixon, supra* . . . .

The majority may be correct in its conclusion that "a rule of absolute immunity will not leave the nation without sufficient remedies for misconduct on the part of the chief executive."

Such a rule will, however, leave Mr. Fitzgerald without an adaquate remedy for the harms that he may have suffered. More importantly, it will leave future plaintiffs without a remedy, regardless of the substantiality of their claims.

The remedies in which the court finds comfort were never designed to afford relief for individual harms. Rather, they were designed as political safety-valves. Politics and history, however, are not the domain of the courts; the courts exist to assure each individual that he, as an individual, has enforceable rights that he may pursure to achieve a peaceful redress of his legitimate grievances.

I find it ironic, as well as tragic, that the court would so casually discard its own role of assuring "the right of every individual to claim the protection of the laws," *Marbury vs. Madison*, in the name of protecting the principle of separation of powers. Accordingly, I dissent.

NYT 6/25

Fitzgerald file

HIGH COURT HOLDS PRESIDENT IMMUNE FROM DAMAGE SUITS

5-4 RULING ON NIXON CASE

Companion Decision Upholds 'Qualified' Protection for Chief Executive's Aides

By LINDA GREENHOUSE
Special to The New York Times

WASHINGTON, June 24 — The Supreme Court ruled 5 to 4 today that no President may be sued for damages for any official action he takes while in office.

Overturning a lower court ruling in a suit against former President Richard M. Nixon, the Court declared that "absolute Presidential immunity" is a "functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history."

Excerpts from the rulings, page A12.

In a companion ruling, the Court refused, 8 to 1, to accord the same absolute immunity to top Presidential advisers. But the Justices effectively rewrote the law of "qualified immunity" that applies to most Federal and state officials, making it substantially more likely that courts will dismiss suits against such officials before trial.

Court Bitterly Divided

Because officials covered by "qualified immunity" are sued much more often than the President, the companion ruling has more practical significance than the ruling on Presidential immunity.

But it was the decision on Presidential immunity that left the Court bitterly divided after almost seven months of grappling with the case. The ruling was on a damage suit by a former Air Force budget analyst, A. Ernest Fitzgerald, who charged that he had lost his job as a result of a White House conspiracy to deprive him of his civil rights. He was dismissed after exposing cost overruns in the C5-A transport plane.

The rulings concerned only immunity from civil suits for damages, not from criminal prosecutions or from other types of judicial action. The majority made clear that it was not casting any doubt on the Court's 1974 ruling that required President Nixon to turn over the Watergate tapes. Today's ruling was based largely on what Associate Justice Lewis F. Powell Jr. called the "public

Continued on Page A12, Column 3

High Court Rules President Is Immune From Civil Suits

Continued From Page A1

interest" in permitting a President to act as he sees fit without fear of being sued.

Justice Powell wrote the majority opinion, joined by Chief Justice Warren E. Burger and Associate Justices William H. Rehnquist, John Paul Stevens and Sandra Day O'Connor.

Associate Justice Byron R. White's dissenting opinion, which labeled the majority ruling "tragic" and "bizarre," was joined by Associate Justices William J. Brennan Jr., Thurgood Marshall and Harry A. Blackmun.

The Supreme Court has accorded absolute immunity from civil suits to judges and prosecutors, and Justice Powell said that, like those officials, "a President must concern himself with matters likely to arouse the most intense feelings."

"Yet, as our decisions have recognized," he continued, "it is in precisely such cases that there exists the greatest public interest in providing an official the maximum ability to deal fearlessly and impartially with the duties of his office. This concern is compelling where the officeholder must make the most sensitive and far-reaching decisions entrusted to any official under our constitutional system."

The majority rejected the argument that the scope of a President's immunity should be limited to particular functions, concluding that absolute immunity extends to all "acts within the 'outer perimeter' of his official responsibility." Mr. Fitzgerald had argued that whatever immunity a President might enjoy should not extend to discharging civil servants.

Mr. Fitzgerald recently settled a separate suit against the Federal Government, winning back his job and $200,000 in legal fees.

Earlier, he and Mr. Nixon had entered into an agreement to avoid a trial of his damage suit no matter how the Supreme Court ruled on the immunity issue. Mr. Nixon paid him $142,000 and would have paid him $28,000 more had the Supreme Court upheld the ruling of the United States Court of Appeals for the District of Columbia that the President did not have absolute immunity.

[The Associated Press quoted a spokesman for Mr. Nixon in New York, Nicholas Ruwe, as saying, "Former President Nixon's custom is not to comment on court decisions." Mr. Fitzgerald, at a news conference, said he was "obviously not" pleased with the ruling, which he said "ought to frighten anyone who loves liberty."]

Associate Justice Lewis F. Powell Jr. wrote the majority opinion.

Justice Powell said that the decision "will not leave the nation without sufficient protection against misconduct on the part of the chief executive." The impeachment process, as well as "constant scrutiny by the press" and "vigilant oversight by Congress," he said, will insure that "absolute immunity will not place the President 'above the law.'"

In his dissenting opinion, Justice White disagreed with that analysis. The majority, he said, "concludes that whatever the President does and however contrary to law he knows his conduct to be, he may, without fear of liability, injure Federal employees or any other person within or without the Government."

"Attaching absolute immunity to the office of the President, rather than to particular activities that the President might perform, places the President above the law," Justice White continued. "It is a reversion to the old notion that the king can do no wrong."

Aides Also Named in Suit

In his $3.5 million lawsuit, Mr. Fitzgerald also named two of President Nixon's senior aides, Bryce N. Harlow and Alexander P. Butterfield. They argued that they, too, were entitled to absolute immunity "derivative" of the President's.

The Court rejected that argument in a separate opinion by Justice Powell, with only Chief Justice Burger arguing in dissent that absolute immunity was necessary to protect the President's "alter egos" from the same pressures from which immunity protected the President.

But in ruling that Mr. Harlow and Mr. Butterfield were entitled only to the "qualified immunity" the Court has previously accorded to Cabinet officers, governors and other officials, the Justices gave "qualified immunity" a new definition.

In the past, Justice Powell noted, an official claiming "qualified immunity" had to meet both an objective and a subjective test.

Objectively, the official had to prove that he did not know, or could not reasonably have been expected to know, that he had violated the plaintiff's legal or constitutional rights. Subjectively, he also had to prove that he had not acted "with malicious intent."

While the objective test can often be met by demonstrating that the law was unclear or the constitutional right undefined at the time of the events, it has been much harder for officials to prove their lack of malice.

Subjective Aspect Ended

The Court today abolished the subjective aspect of qualified immunity.

Justice Powell said: "Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."

In practical terms, the new definition means that officials who are sued will be much more likely to succeed in having suits dismissed on "summary judgment" before trial. Judges now refuse to grant summary judgment because the official's state of mind is an issue that typically has to be decided by a jury after conflicting evidence is heard. State of mind will no no longer be an issue.

As a result of the ruling on Presidential immunity, in the case of Nixon v. Fitzgerald (No. 79-1738), Mr. Fitzgerald's lawsuit will be dismissed by the appeals court. In the second ruling, in the case of Harlow and Butterfield v. Fitzgerald (No. 80-945), the Supreme Court vacated the appeals court's ruling on qualified immunity and ordered it to take "further action consistent with this opinion."

Elliot L. Richardson, who represented the two officials in the Supreme Court, said today that he was "confident" that the suit against them would now be dismissed.

June 30, 1982 File

JUL 1 - 1982

Nixon v Fitzgerald

The Honorable Harry A. Blackmun
Supreme Court of the United States
c/o the Clerk of the Supreme Court
of the United States
One First Street, N. E.
Washington, D. C. 20543

Dear Justice Blackmun:

It has come to my attention that there is a factual error in the letter I sent to you on June 29, 1982. I stated in the first paragraph of that letter that I no longer represented Mr. Fitzgerald when the Petition for Writ of Certiorari was filed on Mr. Nixon's behalf in the Supreme Court. In fact, the Petition was filed on May 2, 1980, and I ceased representing Mr. Fitzgerald on July 20, 1981. I apologize for the error.

While this change makes no difference at all in terms of the points I was making in my letter, I did want to make certain that the letter was in all respects accurate.

Sincerely yours,

E. Barrett Prettyman, Jr.

E. Barrett Prettyman, Jr.
Suite 600
815 Connecticut Avenue, N. W.
Washington, D. C. 20006

EBP;pmd

cc: All Members of the Court
Clerk of the Court

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

July 7, 1982

Memorandum to Justice Powell

Re: Nixon v. Fitzgerald, No. 79-1738; and
Harlow and Butterfield v. Fitzgerald,
No. 80-945

In the above cases I have prepared judgments pursuant to Rule 50.2 dealing with costs. There was only one joint appendix prepared by petitioners Harlow and Butterfield for use in both of the cases for a total cost of $26,649.57. I am concerned with the award of total costs against Mr. Fitzgerald. Certainly, in the Nixon case, which is a true reversal, Mr. Fitzgerald should bear the costs. In the Harlow, et al., case, while the opinion provides that the judgment of the Court of Appeals is vacated (The Court of Appeals apparently dismissed petitioners' appeal from the denial of their immunity defense), the Supreme Court has remanded the case so the District Court may reconsider respondent's pretrial showing, in connection with petitioners' motion for summary judgment. Hence, it does not truly appear that petitioners prevailed in this Court.

It might be more equitable to apportion the total printing cost so that Fitzgerald would pay costs in the Nixon case and split the cost with respect to the Harlow, et al., case for a total of two-thirds of the costs of printing the joint appendix. Petitioners Harlow and Butterfield would bear the additional one-third printing cost. I have prepared a proposed judgment that provides Harlow and Butterfield to recover $17,766.38 from Fitzgerald which would represent the printing cost of petitioner Nixon and one-half of the cost of printing in the Harlow, et al., case. I am also attaching a proposed judgment that awards total costs against Fitzgerald.

Respectfully submitted,

Al Stevas

Alexander L. Stevas
Clerk

Attachments

dfl 07/08/82

To: Justice Powell
From: David
Re: Costs in Harlow and Nixon--## 80-945 and 79-1738

The cost of printing the joint appendix in these cases came to $26,949.57. There was only one joint appendix in the two cases.

Clerk Stevas proposes that Fitzgerald pick up 2/3 of the tab. He reasons that there were three defendants and that the cost of printing may be thought of as divided among the three. Fitzgerald clearly lost in Nixon and so he must pay Nixon's third. But Fitzgerald did not clearly lose in Harlow. The judgment below was vacated, and normally if the judgment below is vacated the winner below--Fitzgerald, here--pays the costs. Yet in this case Harlow and Butterfield were also losers: their claim of absolute immunity was rejected. Because of the uncertainty Clerk Stevas suggests that you split the difference between Harlow/Butterfield and Fitzgerald. Thus of the remaining two thirds of expense Fitzgerald would pay 1/3 and Harlow and Butterfield would make up the remaining third.

Clerks Stevas' recommendation is reasonable. I'm inclined to think, however, that even though the decision

below--an order of dismissal without opinion--was vacated, Harlow and Butterfield really did lose. They brought the matter here on an interlocutory appeal to establish absolute immunity for presidential advisers. I think that a fairer way to apportion costs would be to think of costs as divided in two between the two cases. Fitzgerald won one case and lost one. He should pay Nixon's half or $13,474.79.

July 12, 1982

Nos. 79-1738 and 80-945, Nixon and Harlow cases

Dear Byron,

In enclose copies of Al Stevas' letter of July 7 and of two drafts of proposed judgments: one that would impose the total $26,900.57 costs on Fitzgerald, and the other that would split the costs two-thirds to Fitzgerald and one third to Harlow and Butterfield.

Al recommends the latter (i.e. the division of the costs). I am inclined to agree with his recommendation. I doubt the fairness of imposing the total costs on Fitzgerald. He did not clearly lose in Harlow. The judgment below was vacated, and normally this would result in Fitzgerald paying the costs. Yet, Harlow and Butterfield failed in their claim of absolute immunity. They are better postured to prevail on the remand in view of the changed standard.

What do you think?

Sincerely,

Mr. Justice White
United States Supreme Court
1 First Street, N. E.
Washington, D. C. 20543

Supreme Court of the United States

Memorandum

1/16, 1982

Justice Powell,

Justice White is in today but will probably be here all 3 sitting weeks. From what I hear he doesn't know why he was attacked.

Jimmy

Supreme Court of the United States
Washington, D. C. 20543

JUL 16 1982

CHAMBERS OF
JUSTICE BYRON R. WHITE

July 16, 1982

Re: 79-1738 and 80-945:
Nixon and Harlow cases

Dear Lewis,

Your recommendation on the division of costs in these cases is fine with me.

No big deal in Utah, but I've always disliked being blind-sided. Fred Graham was on the spot and helped subdue the aggressor. Fred apparently was protecting my First Amendment right to speak.

Best regards to Jo.

Sincerely yours,

Byron

Justice Powell

Nixon

July 20, 1982

Re: Nos. 79-1738 and 80-945, Nixon and Harlow

Dear Al,

Thank you for your letter of July 7, that finally reached me here in Richmond.

Justice White and I both agree with your recommendation to apportion the total printing costs two-thirds to Fitzgerald and one-third to Harlow and Butterfield.

I have initialed and return the Orders to this effect.

Sincerely,

Enclosures:
Orders

The Hon.
Alexander L. Stevas, Esquire
Clerk
Supreme Court of the United States
1 First Street, N. E.
Washington, D. C. 20543

cc: Mr. Justice White
United States Supreme Court
1 First Street, N. E.
Washington, D. C. 20543

djb

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

Personal

June 9, 1982

Re: No. 79-1738 - Nixon v. Fitzgerald

Dear Lewis:

The "closing crunch" is always bad and worse this year. But the pressures must not lead us into grave errors of constitutional dimensions. I cannot believe that Bill and Sandra like Note 27, for it significantly undermines the entire holding of this case. For the Court to make a Constitutional holding and then give intimations that Congress -- under some circumstances -- could change it, does even more than undermine the immediate holding. It would inevitably add a new dimension to the now dormant drive in Congress to curtail the Court's jurisdiction. So far as I am concerned Congress can no more alter or modify the basic holding of this case than it can modify or overrule Marbury v. Madison, Brown v. Board of Education, or Nixon v. U.S.. Had the matter remained dormant I could have joined the opinion with a reservation that I did not agree with Footnote 27. But Harry's opinion flushed the point directly. We simply cannot have it both ways. Perhaps the next step is to have a session with the five who are in the majority and see if this can't be hammered out. I will make myself available at any time.

Regards,

WEB

Justice Powell

I'm sorry this will hold up the case but perhaps we should have a Monday or a Wednesday opinion day from now on

W.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 9, 1982

MEMORANDUM TO THE CONFERENCE

79-1738 Nixon v. Fitzgerald

If we are to continue the two year debate (happily outside of our opinions!), the Time magazine article confirms that, indeed, a President is not above the law. The Nixon Tapes Case and the imminent impeachment resolution, made this clear. I could find nothing in the Time review about private damage suit actions.

L.F.P.,Jr.

ss

June 9, 1982

PERSONAL

79-1738 Nixon v. Fitzgerald

Dear Chief:

You will not be surprised that your letter of this afternoon, requiring that we carry this case over, comes as more than a little disappointing - especially as it comes in the "closing crunch" of the Term.

But, of course, any member of this Court has this privilege, and I appreciate that you have reservations about the opinion - although it has been substantially in this form for some time.

In any event, I am agreeable to getting the five of us together to discuss your concern. I hope this can be done on Friday or Monday at the latest.

I assume that at Conference tomorrow you will say simply that you are not ready for Nixon and Harlow to come down.

Sincerely,

The Chief Justice

lfp/ss

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: _____

Recirculated: 9 JUN 1982

pp. 6, 9-10, 14, 29 & stylistic

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1738

RICHARD NIXON, PETITIONER *v.*
A. ERNEST FITZGERALD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June —, 1982]

JUSTICE WHITE, dissenting.

The four dissenting members of the Court in *Butz* v. *Economou*, 438 U. S. 478 (1978), argued that all federal officials are entitled to absolute immunity from suit for any action they take in connection with their official duties. That immunity would extend, even to actions taken with express knowledge that the conduct was clearly contrary to the controlling statute or clearly violative of the Constitution. Fortunately, the majority of the Court rejected that approach: We held that although public officials perform certain functions that entitle them to absolute immunity, the immunity attaches to particular functions—not to particular offices. Officials performing functions for which immunity is not absolute enjoy qualified immunity; they are liable in damages only if their conduct violated well-established law and if they should have realized that their conduct was illegal.

The Court now applies the dissenting view in *Butz* to the office of the President: A President acting within the outer boundaries of what Presidents normally do may, without liability, deliberately cause serious injury to any number of citizens even though he knows his conduct violates a statute or tramples on the constitutional rights of those who are injured. Even if the President in this case ordered Fitzgerald fired by means of a trumped-up reduction in force, knowing

that such a discharge was contrary to the civil service laws, he would be absolutely immune from suit. By the same token, if a President, without following the statutory procedures which he knows apply to himself as well as to other federal officials, orders his subordinates to wiretap or break into a home for the purpose of installing a listening device, and the officers comply with his request, the President would be absolutely immune from suit. He would be immune regardless of the damage he inflicts, regardless of how violative of the statute and of the Constitution he knew his conduct to be, and regardless of his purpose.[1]

The Court intimates that its decision is grounded in the Constitution. If that is the case, Congress can not provide a remedy against presidential misconduct and that the criminal laws of the United States are wholly inapplicable to the President. I find this approach completely unacceptable. I do not agree that if the office of President is to operate effectively, the holder of that office must be permitted, without fear of liability and regardless of the function he is performing, deliberately to inflict injury on others by conduct that he knows violates the law.

We have not taken such a scatter-gun approach in other cases. *Butz* held that absolute immunity did not attach to the office held by a member of the President's Cabinet but only to the specific functions performed by that officer for which absolute immunity is clearly essential. Members of Congress are absolutely immune under the Speech or Debate Clause of the Constitution, but the immunity extends only to their legislative acts. We have never held that in order for legislative work to be done, it is necessary to immunize all of the tasks that legislators must perform. Constitutional immunity does not extend to those many things that Senators and Representatives regularly and necessarily do that are not legislative acts. Members of Congress, for example, re-

[1] This, of course, is not simply a hypothetical example. See *Kissinger* v. *Halperin*, *aff'd* by an equally divided Court, 452 U. S. 713 (1981).

peatedly importune the executive branch and administrative agencies outside hearing rooms and legislative halls, but they are not immune if in connection with such activity they deliberately violate the law. *United States* v. *Brewster*, 408 U. S. 501 (1972), for example, makes this clear. Neither is a Member of Congress or his aide immune from damage suits if in order to secure information deemed relevant to a legislative investigation, he breaks into a house and carries away records. *Gravel* v. *United States*, 408 U. S. 606 (1972). Judges are absolutely immune from liability for damages, but only when performing a judicial function, and even then they are subject to criminal liablity. See *Dennis* v. *Sparks*, 449 U. S. 24, 31 (1980), *O'Shea* v. *Littleton*, 414 U. S. 488, 503 (1974). The absolute immunity of prosecutors is likewise limited to the prosecutorial function. A prosecutor who directs that an investigation be carried out in a way that is patently illegal is not immune.

In *Marbury* v. *Madison*, the Court, speaking through the Chief Justice, observed that while there were "important political powers" committed to the President for the performance of which neither he nor his appointees were accountable in court, "the question, whether the legality of the act of the head of a department be examinable in a court of justice or not, must always depend on the nature of that act." 1 Cranch, 137, 165 (1803). The Court nevertheless refuses to follow this course with respect to the President. It makes no effort to distinguish categories of presidential conduct that should be absolutely immune from other categories of conduct that should not qualify for that level of immunity. The Court instead concludes that whatever the President does and however contrary to law he knows his conduct to be, he may, without fear of liability, injure federal employees or any other person within or without the government.

Attaching absolute immunity to the office of the President, rather than to particular activities that the President might perform, places the President above the law. It is a rever-

sion to the old notion that the King can do no wrong. Until now, this concept had survived in this country only in the form of sovereign immunity. That doctrine forecloses suit against the government itself and against government officials, but only when the suit against the latter actually seeks relief against the sovereign. *Larsen* v. *Domestic and Foreign Corp.*, 337 U. S. 682, 687 (1949). Suit against an officer, however, may be maintained where it seeks specific relief against him for conduct contrary to his statutory authority or to the Constitution. *Id.*, at 698. Now, however, the Court clothes the office of the President with sovereign immunity, placing it beyond the law.

In *Marbury* v. *Madison*, *supra*, at 163, the Chief Justice, speaking for the Court, observed that the "Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to observe this high appellation, if the laws furnish no remedy for the violation of a vested legal right." Until now, the Court has consistently adhered to this proposition. In *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974), a unanimous Court held that the governor of a state was entitled only to a qualified immunity. We reached this position, even though we recognized that

> "[i]n the case of higher officers of the executive branch—the inquiry is far more complex since the range of decisions and choices—whether the formulation of policy, of legislation, of budgets, or of day-to-day decisions—is virtually infinite—in short, since the options which the chief executive and his principal subordinates must consider are far broader and far more subtle than those made by officials with less responsibility, the range of discretion must be comparably broad." *Id.*, at 246, 247.

As JUSTICE BRENNAN observed in *McGautha* v. *California*, 402 U. S. 183, 252 (dissenting opinion), "The principle that our government shall be of laws and not of men is so

strongly woven into our constitutional fabric that it has found recognition in not just one but several provisions of the Constitution" (footnote omitted). And as THE CHIEF JUSTICE said in *Complete Auto Transit, Inc.* v. *Reis*, 451 U. S. 401, 429 (1981) (dissenting opinion):

> "Accountability of each individual for individual conduct lies at the core of all law—indeed, of all organized societies. The trend to eliminate or modify sovereign immunity is not an unrelated development; we have moved away from 'the king can do no wrong.' The principle of individual accountability is fundamental if the structure of an organized society is not to be eroded to anarchy and impotence, and it remains essential in civil as well as criminal justice."

Unfortunately, the Court now abandons basic principles that have been powerful guides to decision. It is particularly unfortunate since the judgment in this case has few, if any, indicia of a judicial decision; it is almost wholly a policy choice, a choice that is without substantial support and that in all events is ambiguous in its reach and import.

We have previously stated that "the law of privilege as a defense to damage actions against officers of government has 'in large part been of judicial making.'" *Butz* v. *Economou*, 438 U. S. at 501–502 (1978), quoting *Barr* v. *Mateo*, 360 U. S. 564, 569 (1959). But this does not mean that the Court has simply "enacted" its own view of the best public policy. No doubt judicial convictions about public policy—whether and what kind of immunity is necessary or wise—have played a part, but the courts have been guided and constrained by common-law tradition, the relevant statutory background and our constitutional structure and history. Our cases dealing with the immunity of members of Congress are constructions of the Speech or Debate Clause and are guided by the history of such privileges at common law. The decisions dealing with the immunity of state officers involve the ques-

tion of whether and to what extent Congress intended to abolish the common law privileges by providing a remedy in the predecessor of 42 U. S. C. § 1983 for constitutional violations by state officials. Our decisions respecting immunity for federal officials, including absolute immunity for judges, prosecutors and those officials doing similar work, also in large part reflect common law views, as well as judicial conclusions as to what privileges are necessary if particular functions are to be performed in the public interest.

Unfortunately, there is little of this approach in the Court's decision today. A footnote casually, but candidly, abandons the functional approach to immunity that has run through all of our decisions. *Ante*, at n. 34. Indeed, the majority turns this rule on its head by declaring that because the functions of the President's office are so varied and diverse and some of them so profoundly important, the office is unique and must be clothed with office-wide, absolute immunity. This is policy, not law, and in my view, very poor policy.

I

In declaring the President to be absolutely immune from suit for any deliberate and knowing violation of the Constitution or of a federal statute, the Court asserts that the immunity is "rooted in the constitutional tradition of the separation of powers and supported by our history"[2] *Ante*, at 17. The decision thus has all the earmarks of a constitutional pronouncement—absolute immunity for the President's office is mandated by the Constitution. Although the Court appears to disclaim this, *ante* at n. 27, it is difficult to read the opinion coherently as standing for any narrower proposition: Attempts to subject the President to liability either by Congress through a statutory action or by the courts through a *Bivens* proceeding would violate the separation of powers.[3]

[2] Although the majority opinion initially claims that its conclusion is based substantially on "our history," historical analysis in fact plays virtually no part in the analysis that follows.

[3] On this point, I am in agreement with the concurring memorandum of

Such a generalized absolute immunity cannot be sustained when examined in the traditional manner and in light of the traditional judicial sources.

The petitioner and the Solicitor General, as amicus,[4] rely principally on two arguments to support the claim of absolute immunity for the President from civil liability: absolute immunity is an "incidental power" of the Presidency, historically recognized as implicit in the Constitution, and absolute immunity is required by the separation of powers doctrine. I will address each of these contentions.

A

The Speech or Debate Clause, Art. I, § 6, guarantees absolute immunity to members of Congress; nowhere, however, does the Constitution directly address the issue of presidential immunity.[5] Petitioner nevertheless argues that the debates at the Constitutional Convention and the early history of constitutional interpretation demonstrate an implicit assumption of absolute presidential immunity. In support of this position, petitioner relies primarily on three separate items: First, preratification remarks made during the discussion of presidential impeachment at the Convention and in *The Federalist*; second, remarks made during the meeting of the first Senate; and third, the views of Justice Story.

The debate at the Convention on whether or not the President should be impeachable did touch on the potential dangers of subjecting the President to the control of another branch, the Legislature.[6] Governor Morris, for example,

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THE CHIEF JUSTICE.

[4] The Solicitor General relies entirely upon the brief filed by his office in *Kissinger* v. *Halperin*, *supra*.

[5] In fact, insofar as the Constitution addresses the issue of Presidential liability, its approach is very different from that taken in the Speech or Debate Clause. The possibility of impeachment assures that the President can be held accountable to the other branches of Government for his actions; the Constitution further states that impeachment does not bar criminal prosecution.

[6] The debate is recorded in 2 M. Farrand, Records of the Federal Con-

complained of the potential for dependency and argued that "[the President] can do no criminal act without Coadjutors who may be punished. In case he should be re-elected, that will be sufficient proof of his innocence."[7] Col. Mason responded to this by asking if "any man [shall] be above Justice" and argued that this was least appropriate for the man "who can commit the most extensive injustice."[8] Madison agreed that "it [is] indispensable that some provision should be made for defending the Community against the incapacity, negligence or perfidy of the chief Magistrate."[9] Pinkney responded on the other side, believing that if granted the power, the Legislature would hold impeachment "as a rod over the Executive and by that means effectually destroy his independence."[10]

Petitioner concludes from this that the delegates meant impeachment to be the exclusive means of holding the President personally responsible for his misdeeds, outside of electoral politics. This conclusion, however, is hardly supported by the debate. Although some of the delegates expressed concern over limiting presidential independence, the delegates voted eight to two in favor of impeachment. Whatever the fear of subjecting the President to the power of another branch, it was not sufficient, or at least not sufficiently shared, to insulate the President from political liability in the impeachment process.

Moreover, the Convention debate did not focus on wrongs the President might commit against individuals, but rather on whether there should be a method of holding him accountable for what might be termed wrongs against the state.[11]

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vention of 1787, 64–69 (1934).

[7] *Id.*, at 64.

[8] *Id.*, at 65.

[9] *Ibid.*

[10] *Id.*, at 66.

[11] In Federalist No. 65, Hamilton described impeachable offenses as follows: "They are of a nature which may with peculiar propriety be denomi-

Thus, examples of the abuses that concerned delegates were betrayal, oppression, and bribery; the delegates feared that the alternative to an impeachment mechanism would be "tumults and insurrections" by the people in response to such abuses. The only conclusions that can be drawn from this debate are that the independence of the Executive was not understood to require a total lack of accountability to the other branches and that there was no general desire to insulate the President from the consequences of his improper acts.[12]

Much the same can be said in response to petitioner's reliance on *The Federalist* No. 77. In that essay, Hamilton asked whether the presidency combines "the requisites to safety in the republican sense—a due dependence on the people—a due responsibility." He answered that the constitutional plan met this test because it subjected the President to both the electoral process and the possibility of impeachment, including subsequent criminal prosecution. Petitioner concludes from this that these were intended to be the exclusive means of restraining presidential abuses. This, by no means follows. Hamilton was concerned in Federalist No. 77, as were the delegates at the Convention, with the larger political abuses,—"wrongs against the state"—that a President

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nated political, as they relate chiefly to injuries done immediately to the society itself."

[12] The majority's use of the historical record is in line with its other arguments: It puts the burden on respondent to demonstrate no presidential immunity, rather than on petititoner to prove the appropriateness of this defense. Thus, while noting that the doubts of some of the Framers were not sufficient to prevent the adoption of the Impeachment Clause, the majority nevertheless states that "nothing in [the] debates suggests an expectation that the President would be subjected to [civil damages actions]." *Ante*, at n. 31. Of course, nothing in the debates suggests an expectation that the President would not be liable in civil suits for damages either. Nevertheless, the debates are one element that the majority cites to support its conclusion that "[t]he best historical evidence clearly supports the Presidential immunity we have upheld." *Ante*, at n. 31.

might commit. He did not consider what legal means might be available for redress of individualized grievances.[13]

That omission should not be taken to imply exclusion in these circumstances is well illustrated by comparing some of the remarks made in the state ratifying conventions with Hamilton's discussion in No. 77. In the North Carolina ratifying convention, for example, there was a discussion of the adequacy of the impeachment mechanism for holding executive officers accountable for their misdeeds. Governor Johnson defended the constitutional plan by distinguishing three legal mechanisms of accountability:

> "If an officer commits an offence against an individual, he is amenable to the courts of law. If he commits crimes against the state, he may be indicted and punished. Impeachment only extends to high crimes and misdemeanors in a *public office*. It is a mode of trial pointed out for great misdemeanors against the public."[14]

Governor Johnson surely did not contemplate that the availability of an impeachment mechanism necessarily implied the exclusion of other forms of legal accountability; rather, the method of accountability was to be a function of the character of the wrong. Mr. Maclaine, another delegate to the North Carolina Convention, clearly believed that the courts would

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[13] Other commentary on the proposed Constitution did, however, consider the subject of presidential immunity. In fact, the subject was discussed in the first major defense of the Constitution published in the United States. In his essays on the Constitution, published in the *Independent Gazetteer* in September 1787, Tench Coxe included the following statement in his description of the limited power of the proposed office of the President: "*His person is not so much protected as that of a member of the House of Representatives; for he may be proceeded against like any other man in the ordinary course of law.*" Quoted in II The Documentary History of the Ratification of the Constitution 141 (1976) (emphasis in original).

[14] 4 Elliot's Debates on the Federal Constitution, at 43.

remain open to individual citizens seeking redress from injuries caused by presidential acts:

> "The President is the superior officer, who is to see the laws put in execution. He is amenable for any maladministration in his office. Were it possible to suppose that the President should give wrong instructions to his deputies, whereby the citizens would be distressed, they would have redress in the ordinary courts of common law." [15]

A similar distinction between different possible forms of presidential accountability was drawn by Mr. Wilson at the Pennsylvania ratifying convention:

> "[The President] is placed high, and is possessed of power far from being contemptible; yet not a *single privilege* is annexed to his character; far from being above the laws, he is amenable to them in his private character as a citizen, and in his public character by *impeachment*." [16]

There is no more reason to respect the views of Hamilton than those of Wilson: both were members of the constitutional convention; both were instrumental in securing the ratification of the Constitution. But more importantly, there is simply no express contradiction in their statements. Petitioner relies on an inference drawn from silence to create this contradiction. The surrounding history simply does not support this inference.

The second piece of historical evidence cited by petitioner is an exchange at the first meeting of the Senate, involving Vice-President Adams and Senators Ellsworth and MacClay. The debate started over whether or not the words "the Presi-

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[15] *Id.*, at 47.
[16] 2 Elliot 480.

dent" should be included at the beginning of Federal writs, similar to the manner in which English writs ran in the King's name. Senator MacClay thought that this would improperly combine the executive and judicial branches. This, in turn, led to a discussion of the proper relation between the two. Senator Ellsworth and Vice-President Adams defended the proposition that

> "the President, personally, was not subject to any process whatever; could have no action, whatever, brought against him; was above the power of judges, justices, &c. For [that] would put it in the power of a common justice to exercise any authority over him, and stop the whole machine of government."[17]

In their view the impeachment process was the exclusive form of process available against the President. Senator MacClay ardently opposed this view and put the case of a President committing "murder in the street." In his view, in such a case neither impeachment nor resurrection were the exclusive means of holding the President to the law; rather, there was "loyal justice." Senator MacClay, who recorded the exchange, concludes his notes with the remark that none of this "is worth minuting, but it shows clearly how amazingly fond of the old leaven many people are."[18] In his view, Senator Ellsworth and his supporters had not fully comprehended the difference in the political position of the American President and that of the British monarch. Again, nothing more can be concluded from this than that the proper scope of presidential accountability, including the question whether the President should be subject to judicial process, was no clearer then than it is now.

The final item cited by petitioner clearly supports his position, but is of such late date that it contributes little to under-

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[17] W. Maclay, Sketches of Debate in the First Senate of the United States in 1789–1791, 152 (1969).

[18] *Ibid.*

standing the original intent. In his Commentaries on the Constitution, published in 1833, Justice Story described the "incidental powers" of the President:

> "Among these must necessarily be included the power to perform [his functions] without any obstruction or impediment whatsoever. The President cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability. In the exercise of his political powers he is to use his own discretion, and he is accountable only to his country and to his own conscience. His decision in relation to these powers is subject to no control, and his discretion, when exercised, is conclusive."[19]

While Justice Story may have been firmly committed to this view in 1833, Senator Pinckney, a delegate to the Convention, was as firmly committed to the opposite view in 1800.[20]

Senator Pinckney, arguing on the floor of the Senate, contrasted the privileges extended to members of Congress by the Constitution with the lack of any such privileges extended to the President.[21] He argued that this was a delib-

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[19] 2 J. Story, Commentaries on the Constitution 372 (1873).

[20] It is not possible to determine whether this is the same Pinckney that Madison recorded as Pinkney, who objected at the Convention to granting a power of impeachment to the Legislature. Two Charles Pinckneys attended the Convention. Both were from South Carolina. See 3 M. Farrand, *supra*, at 559.

[21] Senator Pinckney's comments are recorded at 10 Annals of Congress 69–83. Petitioner contends that these remarks are not relevant because they concerned only the authority of Congress to inquire into the origin of an allegedly libelous newspaper article. Reply Brief for Petitioner, at 7. Although this was the occasion for the remarks, Pinckney did discuss the immunity of members of Congress as a privilege embodied in the Speech or Debate Clause: "our Constitution supposes no man . . . to be infallible, but considers them all as mere men, to be subject to all the passions and frail-

erate choice of the delegates to the Convention, who "well knew how oppressively the power of undefined privileges had been exercised in Great Britain, and were determined no such authority should ever be exercised here." Therefore, "[n]o privilege of this kind was intended for your Executive, nor any except that . . . for your Legislature."[22]

In previous immunity cases the Court has emphasized the

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ties, and crimes, that men generally are, and accordingly provides for the trial of such as ought to be tried, and leaves the members of the Legislature, for their proceedings, to be amenable to their constituents and to public opinion. . . ." This, then, was one of the privileges of Congress that he was contrasting with those extended (or not extended) to the President.

[22] The majority cites one additional piece of historical evidence, a letter by President Jefferson, which it contends demonstrates "that Jefferson believed the President not to be subject to judicial process." *Ante*, at n. 31.

Thomas Jefferson's views on the relation of the President to the judicial process are, however, not quite so clear as the majority suggests. Jefferson took a variety of positions on the proper relation of executive and judicial authority, at different points in his career. It would be suprising if President Jefferson had not argued strongly for such immunity from judicial process, particularly in a confrontation with Chief Justice Marshall. Jefferson's views on this issue before he became President would be of a good deal more significance. In this regard, it is significant that in Jefferson's second and third drafts of the Virginia Constitution, which also proposed a separation of the powers of government into three separate branches, he specifically proposed that the Executive be subject to judicial process: "he shall be liable to action, tho' not to personal restraint for private duties or wrongs." 1 Papers of Thomas Jefferson 350, 360. Also significant is the fact that when Jefferson's followers tried to impeach Justice Chase in 1804–1805, one of the grounds of their attack on him was that he had refused to subpoena President Adams during the trial of Dr. Cooper for sedition. See Corwin, "The President: Office and Powers" 113. Finally, it is worth noting that even in the middle of the debate over Chief Justice Marshall's power to subpoena the President during the Burr trial, Jefferson looked to a legislative solution of the confrontation: "I hope however that . . . at the ensuing session of the legislature [the Chief Justice] may have means provided for giving to individuals the benefit of the testimony of the [Executive] functionaries in proper cases." X Works of Thomas Jefferson, 407 n. (P. Ford Ed. 1905) (quoting a letter from President Jefferson to George Hay, United States District Attorney for Virginia).

I omission

importance of the immunity afforded the particular government official at common law. See *Imbler* v. *Pachtman*, 424 U. S. 409, 421 (1976). Clearly this sort of analysis is not possible when dealing with an office, the presidency, that did not exist at common law. To the extent that historical inquiry is appropriate in this context, it is constitutional history, not common law, that is relevant. From the history discussed above, however, all that can be concluded is that absolute immunity from civil liability for the President finds no support in constitutional text or history, or in the explanations of the earliest commentators. This is too weak a ground to support a declaration by this Court that the President is absolutely immune from civil liability, regardless of the source of liability or the injury for which redress is sought. This much the majority implicitly concedes since history and text, traditional sources of judicial argument, merit only a footnote in the Court's opinion. *Ante*, at n. 31.

B

No bright line can be drawn between arguments for absolute immunity based on the constitutional principle of separation of powers and arguments based on what the Court refers to as "public policy." This necessarily follows from the Court's functional interpretation of the separation of powers doctrine:

> "[I]n determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions." *Nixon* v. *Administrator of General Services*, 433 U. S. 425, 443 (1977).

See also *United States* v. *Nixon*, 418 U. S. 683, 706–707 (1974); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 579, 635 (1952) (Jackson, J., concurring). Petitioner argues that public policy favors absolute immunity because absent such immunity the President's ability to execute his constitutionally

mandated obligations will be impaired. The convergence of these two lines of argument is superficially apparent from the very fact that in both instances the approach of the Court has been characterized as a "functional" analysis.

The difference is only one of degree. While absolute immunity might maximize executive efficiency and therefore be a worthwhile policy, lack of such immunity may not so disrupt the functioning of the presidency as to violate the separation of powers doctrine. Insofar as liability in this case is of congressional origin, petitioner must demonstrate that subjecting the President to a private damages action will prevent him from "accomplishing [his] constitutionally assigned functions." Insofar as liability is based on a *Bivens* action, perhaps a lower standard of functional disruption is appropriate. Petitioner has surely not met the former burden; I do not believe that he has met the latter standard either.

Taken at face value, the Court's position that as a matter of constitutional law the President is absolutely immune should mean that he is immune not only from damages actions but also from suits for injunctive relief, criminal prosecutions and, indeed, from any kind of judicial process. But there is no contention that the President is immune from criminal prosecution in the courts under the criminal laws enacted by Congress or by the states for that matter. Nor would such a claim be credible. The Constitution itself provides that impeachment shall not bar "Indictment, Trial, Judgment, and Punishment, according to Law." Article I, Section II, Clause VII. Similarly, our cases indicate that immunity from damages actions carries no protection from criminal prosecution. *Supra*, at 3.

Neither can there be a serious claim that the separation of powers doctrine insulates presidential action from judicial review or insulates the President from judicial process. No argument is made here that the President, whatever his liability for money damages, is not subject to the courts' injunctive powers. See, *e. g.*, *Youngstown Sheet & Tube Co.*, supra;

Korematsu v. *United States*, 323 U. S. 214 (1944); *Panama Refining Co.* v. *Ryan*, 293 U. S. 38 (1935). Petitioner's attempt to draw an analogy to the Speech or Debate Clause, Brief, at 45, one purpose of which is "to prevent accountability before a possibly hostile judiciary," *Gravel* v. *United States*, 408 U. S., 606, 617 (1972), breaks down at just this point. While the Speech or Debate Clause guarantees that "for any Speech or Debate" congressmen "shall not be questioned in any other Place," and, thus, assures that congressmen, in their official capacity, shall not be the subject of the courts' injunctive powers, no such protection is afforded the Executive. Indeed, as the cases cited above indicate, it is the rule, not the exception, that executive actions—including those taken at the immediate direction of the President—are subject to judicial review.[23] Regardless of the possibility of money damages against the President, then, the constitutionality of the President's actions or their legality under the applicable statutes can and will be subject to review. Indeed, in this very case, respondent Fitzgerald's dismissal was set aside by the Civil Service Commission as contrary to the applicable regulations issued pursuant to authority granted by Congress.

Nor can private damages actions be distinguished on the ground that such claims would involve the President personally in the litigation in a way not necessitated by suits seeking declaratory or injunctive relief against certain presidential actions. The President has been held to be subject to judicial process at least since 1807. *Aaron Burr* case, 25 Fed. Cas. 30 (1807) (Chief Justice Marshall, sitting as circuit justice). *Burr* "squarely ruled that a subpoena may be directed

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[23] The Solicitor General, in fact, argues that the possibility of judicial review of presidential actions supports the claim of absolute immunity: Judicial review "serves to contain and correct the unauthorized exercise of the President's power," making private damages actions unnecessary in order to achieve the same end. Brief, at 31 (see n. 3).

to the President." *Nixon* v. *Sirica*, 487 F. 2d 700, 709 (DC Cir. 1973). Chief Justice Marshall flatly rejected any suggestion that all judicial process, in and of itself, constitutes an unwarranted interference in the Presidency:

> "The guard, furnished to this high officer, to protect him from being harassed by *vexatious* and *unnecessary* subpoenas, is to be looked for in the conduct of a court after those subpoenas have issued; not in any circumstance which is to precede their being issued." 25 Fed. Cas., at 34.

This position was recently rearticulated by the Court in *United States* v. *Nixon*, 418 U. S. 683, 706 (1974):

> "Neither the doctrine of separation of powers, nor the need for confidentiality . . . without more, can sustain an absolute, unqualified presidential privilege of immunity from judicial process under all circumstances."

These two lines of cases establish then that neither subjecting presidential actions to a judicial determination of their constitutionality, nor subjecting the President to judicial process violates the separation of powers doctrine. Similarly, neither has been held to be sufficiently intrusive to justify a judicially declared rule of immunity. With respect to intrusion by the judicial process itself on Executive functions, subjecting the President to private claims for money damages involves no more than this. If there is a separation of powers problem here, it must be found in the nature of the *remedy* and not in the *process* involved.

We said in *Butz* v. *Economou*, 438 U. S. 478 (1978), that "it is not unfair to hold liable the official who knows or should know he is acting outside the law, and . . . insisting on an awareness of clearly established constitutional limits will not unduly interfere with the exercise of official judgment." *Id.* at 506–507. Today's decision in *Harlow* v. *Fitzgerald*, No. 80–945, makes clear that the President, were he subject to

civil liability, could be held liable only for an action that he knew, or as an objective matter should have known, was illegal and a clear abuse of his authority and power. In such circumstances, the question that must be answered is who should bear the cost of the resulting injury—the wrongdoer or the victim.

The principle that should guide the Court in deciding this question was stated long ago by Chief Justice Marshall: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury* v. *Madison*, 1 Cranch 137, 163 (1803). Much more recently, the Court considered the role of a damages remedy in the performance of the courts' traditional function of enforcing federally guaranteed rights: "Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388, 395 (1971).[24] To the extent that the Court denies an otherwise appropriate remedy, it denies the victim the right to be made whole and, therefore, denies him "the protection of the laws."[25]

That the President should have the same remedial obligations toward those whom he injures as any other federal officer is not a surprising proposition. The fairness of the reme-

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[24] See also Justice Harlan's discussion of the appropriateness of the damages remedy in order to redress the violation of certain constitutional rights. *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388, 407–410 (1971) (Harlan, J. concurring).

[25] Contrary to the suggestion of the majority, *ante*, at n. 38, I do not suggest that there must always be a remedy in civil damages for every legal wrong or that *Marbury* v. *Madison* stands for this proposition. *Marbury* does, however, suggest the importance of the private interests at stake within the broader perspective of a political system based on the rule of law. The functional approach to immunity questions, which we have previously followed but which the majority today discards, represented an appropriate reconciliation of the conflicting interests at stake.

dial principle the Court has so far followed—that the wrongdoer, not the victim, should ordinarily bear the costs of the injury—has been found to be outweighed only in instances where potential liability is "thought to injure the governmental decisionmaking process." *Imbler* v. *Pachtman*, 424 U. S. 409, 437 (1976) (WHITE, J., concurring). The argument for immunity is that the possibility of a damages action will, or at least should, have an effect on the performance of official responsibilities. That effect should be to deter unconstitutional, or otherwise illegal, behavior. This may, however, lead officers to be more careful and "less vigorous" in the performance of their duties. Caution, of course, is not always a virtue and undue caution is to be avoided.

The possibility of liability may, in some circumstances, distract officials from the performance of their duties and influence the performance of those duties in ways adverse to the public interest. But when this "public policy" argument in favor of absolute immunity is cast in these broad terms, it applies to all officers, both state and federal: All officers should perform their responsibilities without regard to those personal interests threatened by the possibility of a lawsuit. See *Imbler*, *supra*, at 436 (1976) (WHITE, J., concurring).[26] Inevitably, this reduces the public policy argument to nothing more than an expression of judicial inclination as to which officers should be encouraged to perform their functions with "vigor," although with less care.[27]

The Court's response, until today, to this problem has been to apply the argument to individual functions, not offices, and

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[26] The Court has never held that the "public policy" conclusions it reaches as to the appropriateness of absolute immunity in particular instances are not subject to reversal through congressional action. Implicity, therefore, the Court has already rejected a constitutionally-based, separation of powers argument for immunity for federal officials.

[27] Surely the fact that officers of the court have been the primary beneficiaries of this Court's pronouncements of absolute immunity gives support to this appearance of favoritism.

to evaluate the effect of liability on governmental decision-making within that function, in light of the substantive ends that are to be encouraged or discouraged. In this case, therefore, the Court should examine the functions implicated by the causes of action at issue here and the effect of potential liability on the performance of those functions.

II

The functional approach to the separation of powers doctrine and the Court's more recent immunity decisions[28] converge on the following principle: The scope of immunity is determined by function, not office. The wholesale claim that the President is entitled to absolute immunity in all of his actions stands on no firmer ground than did the claim that all presidential communications are entitled to an absolute privilege, which was rejected in favor of a functional analysis, by a unanimous Court in *United States* v. *Nixon*, supra. Therefore, whatever may be true of the necessity of such a broad immunity in certain areas of executive responsibility,[29] the only question that must be answered here is whether the dismissal of employees falls within a constitutionally assigned executive function, the performance of which would be substantially impaired by the possibility of a private action for damages. I believe it does not.

Respondent has so far proceeded in this action on the basis of three separate causes of action: two federal statutes—5 U. S. C. § 7211 and 18 U. S. C. § 1505—and the First Amendment. At this point in the litigation, the availability of these causes of action is not before us. Assuming the correctness of the the lower court's determination that the two

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[28] See *Supreme Court of Virginia* v. *Consumers Union of the United States*, 446 U. S. 719 (1980); *Butz*, supra, at 511.

[29] I will not speculate on the presidential functions which may require absolute immunity, but a clear example would be instances in which the President participates in prosecutorial decisions.

federal statutes create a private right of action, I find the suggestion that the President is immune from those causes of action to be unconvincing. The attempt to found such immunity upon a separation of powers argument is particularly unconvincing.

The first of these statutes, 5 U. S. C. § 7211, states that "[t]he right of employees . . . to . . . furnish information to either House of Congress, or to a committee or a Member thereof, may not be interfered with or denied." The second, 18 U. S. C. § 1505, makes it a crime to obstruct congressional testimony. It does not take much insight to see that at least one purpose of these statutes is to assure congressional access to information in the possession of the Executive Branch, which Congress believes it requires in order to carry out its responsibilities.[30] Insofar as these statutes implicate a separation of powers argument, I would think it to be just the opposite of that suggested by petitioner and accepted by the majority. In enacting these statutes, Congress sought to preserve its own constitutionally mandated functions in the face of a recalcitrant Executive.[31] Thus, the separation

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[30] See, *e. g.*, 48 Cong. Rec. 4653 (1912) ("During my first session of Congress I was desirous of learning the needs of the postal service and inquiring into the conditions of the employees. To my surprise I found that under an Executive order these civil service employees could not give me any information.") (remarks of Rep. Calder); *id.*, at 4656 ("I believe it is high time that Congress should listen to the appeals of these men and provide a way whereby they can properly present a petition to the Members of Congress for a redress of grievances without the fear of losing their official positions") (remarks of Rep. Reilly); *id.*, at 5157 ("I have always requested employees to consult with me on matters affecting their interest and believe that it is my duty to listen to all respectful appeals and complaints.") (remarks of Rep. Evans). Indeed, it is for just this reason that petitioners in No. 80–945 argue that the statutes do not create a private right of action: "5 U. S. C. § 7211 and 18 U. S. C. § 1505 were designed to protect the legislative process, not to give one such as Fitzgerald a right to seek damages." Brief for petitioners, at 26, n. 11.

[31] Indeed, the impetus for passage of what is now 5 U. S. C. § 7211 was

of powers problem addressed by these statutes was first of all presidential behavior that intruded upon, or burdened, Congress' performance of its own constitutional responsibilities. It is no response to this to say that such a cause of action would disrupt the President in the furtherance of his responsibilities. That approach ignores the separation of powers problem that lies behind the congressional action; it assumes that presidential functions are to be valued over congressional functions.

The argument that by providing a damages action under these statutes (as is assumed in this case) Congress has adopted an unconstitutional means of furthering its ends, must rest on the premise that presidential control of executive employment decisions is a constitutionally assigned presidential function with which Congress may not significantly interfere. This is a frivolous contention. In *United States* v. *Perkins*, 116 U. S. 483, 485 (1886), this Court held that "when Congress, by law, vests the appointment of inferior officers in the heads of Departments it may limit and restrict the power of removal as it deems best for the public interest." Whatever the rule may be with respect to high officers, see *Humphrey's Executor* v. *United States*, 295 U. S. 602 (1935), with respect to those who fill traditional bureaucratic positions, restrictions on executive authority are the rule and not the exception.[32] This case itself demonstrates, the severe statutory restraints under which the President operates in this area.

Fitzgerald was a civil service employee working in the Office of the Secretary of the Air Force. Although his position

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the imposition of "gag rules" upon testimony of civil servants before congressional committees. See Exec. Order No. 402 (Jan. 25, 1906); Exec. Order No. 1142 (Nov. 26, 1909).

[32] Thus, adverse action may generally be taken against civil servants only "for such cause as will promote the efficiency of the service." 5 U. S. C. §§ 7503, 7513 and 7543.

was such as to fall within the "excepted" service, which would ordinarily mean that Civil Service rules and regulations applicable to removals would not protect him, 5 CFR Part 6, § 6.4, his status as a veteran entitled him to special protections. Veterans are entitled to certain Civil Service benefits afforded to "preference eligibles." 5 U. S. C. § 2108. These benefits include that set forth in 5 U. S. C. §7513(a): "An agency may take [adverse action] against an employee only for such cause as will promote the efficiency of the service." Similarly, his veteran status entitled Fitzgerald to the protection of the reduction in force procedures established by civil service regulation. 5 U. S. C. §§ 3501–3502. It was precisely those procedures that the Chief Examiner for the Civil Service Commission found had been violated, in his 1973 recommendation that respondent be reappointed to his old position or to a job of comparable authority.

This brief review is enough to illustrate my point: Personnel decisions of the sort involved in this case are emphatically not a constitutionally assigned presidential function that will tolerate no interference by either of the other two branches of government. More important than this "quantitative" analysis of the degree of intrusion in presidential decisionmaking permitted in this area, however, is the "qualitative" anaylsis suggested in § I(B) above.

Absolute immunity is appropriate when the threat of liability may bias the decisionmaker in ways that are adverse to the public interest. But as the various regulations and statutes protecting civil servants from arbitrary executive action illustrate, this is an area in which the public interest is demonstrably on the side of encouraging less "vigor" and more "caution" on the part of decisionmakers. That is, the very steps that Congress has taken to assure that executive employees will be able freely to testify in Congress and to assure that they will not be subject to arbitrary adverse actions indicate that those policy arguments that have elsewhere justi-

fied absolute immunity are not applicable here. Absolute immunity would be nothing more than a judicial declaration of policy that directly contradicts the policy of protecting civil servants reflected in the statutes and regulations.

If respondent could, in fact, have proceeded on his two statutory claims, the *Bivens* action would be superfluous. Respondent may not collect damages twice, and the same injuries are put forward by respondent as the basis for both the statutory and constitutional claims. As we have said before, "were Congress to create equally effective alternative remedies, the need for damages relief [directly under the Constitution] might be obviated." *Davis* v. *Passman*, 442 U. S. 228, 248 (1979). Nevertheless, because the majority decides that the President is absolutely immune from a *Bivens* action as well, I shall express by disagreement with that conclusion.

In *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388 (1971), we held that individuals who have suffered a compensable injury through a violation of the rights guaranteed them by the Fourth Amendment may invoke the general federal-question jurisdiction of the federal courts in a suit for damages. That conclusion rested on two principles: First, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws," 403 U. S., at 397, quoting *Marbury* v. *Madison*, 1 Cranch 137, 163 (1803); second, "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." 403 U. S., at 395. In *Butz* v. *Economou*, 438 U. S. 478 (1977), we rejected the argument of the federal government that federal officers, including cabinet officers, are absolutely immune from civil liability for such constitutional violations—a position that we recognized would substantially undercut our conclusion in *Bivens*. We held there that although the performance of certain limited functions will be protected by the shield of absolute immunity, the general rule is that federal officers, like state officers, have only a qualified immunity. Finally, in *Davis* v.

Passman, 442 U. S. 228 (1979), we held that a Congressman could be held liable for damages in a *Bivens*-type suit brought in federal court alleging a violation of individual rights guaranteed the plaintiff by the Due Process Clause. In my view, these cases have largely settled the issues raised by the *Bivens* apsect of this case.

These cases established the following principles. First, it is not the exclusive prerogative of the legislative branch to create a federal cause of action for a constitutional violation. In the absence of adequate legislatively prescribed remedies, the general federal-question jurisdiction of the federal courts permits the courts to create remedies, both legal and equitable, appropriate to the character of the injury. Second, exercise of this "judicial" function does not create a separation of powers problem: We have held both executive and legislative officers subject to this judicially created cause of action and in each instance we have rejected separation of powers arguments. Holding federal officers liable for damages for constitutional injuries no more violates separation of powers principles than do the equitable remedies that result from the traditional function of judicial review. Third, federal officials will generally have a "qualified immunity" from such suits; absolute immunity will be extended to certain functions only on the basis of a showing that exposure to liability is inconsistent with the proper performance of the official's duties and responsibilities. Finally, Congress retains the power to restrict exposure to liability, and the policy judgments implicit in this decision should properly be made by Congress.

The majority fails to recognize the force of what the Court has already done in this area. Under the above principles, the President could not claim that there are no circumstances under which he would be subject to a *Bivens*-type action for violating respondent's constitutional rights. Rather, he must assert that the absence of absolute immunity will substantially impair his ability to carry out particular functions that are his constitutional responsibility. For the reasons I

have presented above, I do not believe that this argument can be successfully made under the circumstances of this case.

It is, of course, theoretically possible, that the President should be held to be absolutely immune because each of the functions for which he has constitutional responsibility would be substantially impaired by the possibility of civil liability. I do not think this argument is valid for the simple reason that the function involved here does not have this character. Which side of the line other presidential functions would fall on need not be decided in this case.

The majority opinion suggests a variant of this argument. It argues, not that every presidential function has this character, but that distinguishing the particular functions involved in any given case would be "difficult." *Ante*, at n. 34.[33] Even if this were true, it would not necessarily follow that the President is entitled to absolute immunity: That would still depend on whether, in those unclear instances, it is likely to be the case that one of the functions implicated deserves the protection of absolute immunity. In this particular case, I see no such function.[34]

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[33] The majority also seems to believe that by "function" the Court has in the past referred to "subjective purpose." See *ante*, at n. 34 ("judges frequently would need to inquire into the *purpose* for which acts were taken."). I do not read our cases that way. In *Stump* v. *Sparkman*, 435 U. S. 349, 362 (1978), we held that the factors determining whether a judge's act was a "judicial action" entitled to absolute immunity "relate to the nature of the act itself, i. e, whether it is a function normally performed by a judge, and to the expectations of the parties." Neither of these factors required any analysis of the purpose the judge may have had in carrying out the particular action. Similarly in *Butz* v. *Economou*, 438 U. S. 478, 512–516 (1977), when we determined that certain executive functions were entitled to absolute immunity because they shared "enough of the characteristics of the judicial process," we looked to objective qualities and not subjective purpose.

[34] The majority seems to suggest that responsibility for governmental reorganizations is one such function. *Ante*, at n. 34. I fail to see why this

I do not believe that subjecting the President to a *Bivens* action would create separation of powers problems or "public policy" problems different from those involved in subjecting the President to a statutory cause of action.[35] Relying upon the history and text of the Constitution, as well as the analytic method of our prior cases, I conclude that these problems are not sufficient to justify absolute immunity for the President in general, nor under the circumstances of this case in particular.

III

Because of the importance of this case, it is appropriate to examine the reasoning of the majority opinion.

The opinion suffers from serious ambiguity even with respect to the most fundamental point: How broad is the immunity granted the President? The opinion suggests that its scope is limited by the fact that under none of the asserted causes of action "has Congress taken express legislative action to subject the President to civil liability for his official acts." *Ante*, at 16. We are never told, however, how or why Congressional action could make a difference. It is not apparent that any of the propositions relied upon by the majority to immunize the President would not apply equally to such a statutory cause of action; nor does the majority indicate what new principles would operate to undercut those propositions.

In the end, the majority seems to overcome its initial hesitation, for it announces that, "[w]e consider [absolute] immunity a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history," *ante*, at

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should be so.

[35] Although our conclusions differ, the majority opinion reflects a similar view as to the relationship between the two sources of the causes of action in this case: It does not believe it necessary to differentiate in its own analysis between the statutory and constitutional causes of action.

16–17. See also *ante*, at 24 ("A rule of absolute immunity for the President will not leave the Nation without sufficient remedies for misconduct on the part of the chief executive.").[36] While the majority opinion recognizes that "[i]t is settled law that the separation of powers doctrine does not bar every exercise of jurisdiction over the President of the United States," it bases its conclusion, at least in part, on a suggestion that there is a special jurisprudence of the presidency. *Ante*, at 22.[37]

But in *United States* v. *Nixon*, 418 U. S. 683 (1974), we upheld the power of a federal district court to issue a subpoena *duces tecum* against the President. In other cases we have enjoined executive officials from carrying out presidential

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[36] THE CHIEF JUSTICE leaves no doubt that he, at least, reads the majority opinion as standing for the broad proposition that the President is absolutely immune under the Constitution:

"I write separately to underscore that the presidential immunity spelled out today derives from and is mandated by the constitutional doctrine of separation of powers." Concurring opinion of THE CHIEF JUSTICE, *ante*, at 1.

[37] Contrary to the suggestion of the majority, *Mississippi* v. *Johnson*, 71 U. S. 475 (1866), carefully reserved the question of whether a court may compel the President himself to perform ministerial executive functions:

"We shall limit our inquiry to the question presented by the objection, without expressing any opinion on the broader isseus . . . whether, in any case, the President, . . . may be required, by the process of this court, to perform a purely ministerial act under a positive law, or may be held amenable, in any case, otherwise than by impeachment for crime."

Similarly, *Kendall* v. *United States*, 12 Pet. 524 (1838), also cited by the majority, did not indicate that the President could never be subject to judicial process. In fact, it implied just the contrary in rejecting the argument that the mandamus sought involved an unconstitutional judicial infringement upon the Executive Branch:

"The mandamus does not seek to direct or control the postmaster general in the discharage of any official duty, partaking in any respect of an executive character; but to enforce the performance of a mere ministerial act, which neither he nor the president had any authority to deny or control." *Id.*, at 610.

directives. See *e. g.*, *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952). Not until this case has there ever been a suggestion that the mere formalism of the name appearing on the complaint was more important in resolving separation of powers problems than the substantive character of the judicial intrusion upon executive functions.

The majority suggests that the separation of powers doctrine permits exercising jurisdiction over the President only in those instances where "judicial action is needed to serve broad public interests—as when the Court acts, not in derogation of the separation of powers, but to maintain their proper balance." *Ante*, at 23. Without explanation, the majority contends that a "merely private suit for damages" does not serve this function.

The suggestion that enforcement of the rule of law—*i. e.*, subjecting the President to rules of general applicability—does not further the separation of powers, but rather is in derogation of this purpose, is bizarre. At stake in a suit of this sort, to the extent that it is based upon a statutorily created cause of action, is the ability of Congress to assert legal restraints upon the Executive and of the courts to perform their function of providing redress for legal harm. Regardless of what the Court might think of the merits of Mr. Fitzgerald's claim, the idea that pursuit of legal redress offends the doctrine of separation of powers is a frivolous contention passing as legal argument.

Similarly, the majority implies that the assertion of a constitutional cause of action—the whole point of which is to assure that an officer does not transgress the constutitional limits on his authority—may offend separation of powers concerns. This is surely a perverse approach to the Constitution: Whatever the arguments in favor of absolute immunity may be, it is untenable to argue that subjecting the President to constitutional restrictions will undercut his "unique" role in our system of government. It cannot be seriously argued that the President must be placed beyond the law and

beyond judicial enforcement of constitutional restraints upon executive officers in order to implement the principle of separation of powers.

Focusing on the actual arguments the majority offers for its holding of absolute immunity for the President, one finds suprisingly little. As I read the relevant section of the Court's opinion, I find just three contentions from which the majority draws this conclusion. Each of them is little more than a makeweight; together they hardly suffice to justify the wholesale disregard of our traditional approach to immunity questions.

First, the majority informs us that the President occupies a "unique position in the constitutional scheme," including responsibilities for the administration of justice, foreign affairs, and management of the Executive Branch. *Ante*, at 17–18. True as this may be, it says nothing about why a "unique" rule of immunity should apply to the President. The President's unique role may indeed encompass functions for which he is entitled to a claim of absolute immunity. It does not follow from that, however, that he is entitled to absolute immunity either in general or in this case in particular.

For some reason, the majority believes that this uniqueness of the President shifts the burden to respondent to prove that a rule of absolute immunity does not apply. The respondent has failed in this effort, the Court suggests, because the President's uniqueness makes "inapposite" any analogy to our cases dealing with other executive officers. *Ante*, at 18. Even if this were true, it would not follow that the President is entitled to absolute immunity; it would only mean that a particular argument is out of place. But the fact is that it is not true. There is nothing in the President's unique role that makes the arguments used in those other cases inappropriate.

Second, the majority contends that because the President's "visibility" makes him particularly vulnerable to suits for civil damages, *ante*, at 20, a rule of absolute immunity is required.

The force of this argument is surely undercut by the majority's admission that "there is no historical record of numerous suits against the President." *Id*, at n. 33. Even granting that a *Bivens* cause of action did not becomes available until 1971, in the eleven years since then there have been only a handful of suits. Many of these are frivolous and dealt with in a routine manner by the courts and the Justice Department. There is no reason to think that, in the future, the protection afforded by summary judgment procedures would not be adequate to protect the President, as they currently protect other executive officers from unfounded litigation. Indeed, given the decision today in *Harlow & Butterfield* v. *Fitzgerald*, No. 80–945, there is even more reason to believe that frivolous claims will not intrude upon the President's time. Even if judicial procedures were found not to be sufficient, Congress remains free to address this problem if and when it develops.

Finally, the Court suggests that potential liability "frequently could distract a President from his public duties." *Ante*, at 20. Unless one assumes that the President himself makes the countless high level executive decisions required in the administration of government, this rule will not do much to insulate such decisions from the threat of liability. The logic of the proposition cannot be limited to the President; its extension, however, has been uniformly rejected by this Court. See *Butz*, *supra*; *Harlow & Butterfield*, *supra*. Furthermore, in no instance have we previously held legal accountability in itself to be an unjustifiable cost. The availability of the courts to vindicate constitutional and statutory wrongs has been perceived and protected as one of the virtues of our system of delegated and limited powers. As I argued in § I, our concern in fashioning absolute immunity rules has been that liability may pervert the decisionmaking process in a particular function by undercutting the values we expect to guide those decisions. Except for the empty generality that the President should have "'the maximum ability to

deal fearlessly and impartially with' the duties of his office," *ante* at 20, the majority nowhere suggests a particular, disadvantageous effect on a specific presidential function. The caution that comes from requiring reasonable choices in areas that may intrude on individuals' legally protected rights has never before been counted as a cost.

IV

The majority may be correct in its conclusion that "a rule of absolute immunity will not leave the Nation without sufficient remedies for misconduct on the part of the chief executive." *Ante*, at 24. Such a rule will, however, leave Mr. Fitzgerald without an adequate remedy for the harms that he may have suffered. More importantly, it will leave future plaintiffs without a remedy, regardless of the substantiality of their claims. The remedies in which the Court finds comfort were never designed to afford relief for individual harms. Rather, they were designed as political safety-valves. Politics and history, however, are not the domain of the courts; the courts exist to assure each individual that he, as an individual, has enforcable rights that he may pursue to achieve a peaceful redress of his legitimate grievances.

I find it ironic, as well as tragic, that the Court would so casually discard its own role of assuring "the right of every individual to claim the protection of the laws," *Marbury* v. *Madison*, 1 Cranch 137, 163 (1803), in the name of protecting the principle of separation of powers. Accordingly, I dissent.

(A) Crimes - 2-4 (But see #15 (all cases cited by BRW are damage suits) L.F.P
Stumpf - 3
Above the law - 3, 30
Policy - not judicial - decision - 5
guided by "history" - 5, 6 common law - 5, 6, 13
(no record of damage suit vs Pres) impeachment
Reliance on N.C. Ratification Convention - 10
" " Pa. Convention (helpful) - 10
Dialogue with Madison Ellsworth - 11-12

Check what BRW says about Precedency - 12, 18

(A) Suggests liability is imposed by statute (implied cause of action) - 14, 15

(A) Equates the burden of private damage suits to burden of injunctions & to power of a court to subpoena a Pres to testify - 17 (absurd)

"functional" analysis should be Rule - 19

(A) Scope of immunity determined by "function, not office" - 19 (Ct. judges, etc. a ~~precedent~~ judge is immune by virtue of his office) - 19, 26

(A) Discussing employee not Presidential function - 20-22

(A) Only example of absolute immunity cited by BRW is "prosecutorial action" (p 20 n 25)

(A) Assumed that Congress has granted implied cause of action vs Pres - 21 (or "collateral order" do we assume this?)
~~Congress~~ Congress controls who Pres is sued - 22, 29

(A) BRW's "standard" for absolute immunity - 23

To: Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: 11 MAY 1982

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79–1738

RICHARD NIXON, PETITIONER, v. A. ERNEST FITZGERALD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[May —, 1982]

JUSTICE WHITE, dissenting.

The four dissenting members of the Court in *Butz* v. *Economou*, 438 U. S. 478 (1978), argued that all federal officials are entitled to absolute immunity from suit for any action they take in connection with their official duties. That immunity would extend, even to actions taken with express knowledge that the conduct was clearly contrary to the controlling statute or clearly violative of the Constitution. Fortunately, the majority of the Court rejected that approach: We held that although public officials perform certain functions that entitle them to absolute immunity, the immunity attaches to particular functions—not to particular offices. Officials performing functions for which immunity is not absolute enjoy qualified immunity; they are liable in damages only if their conduct violated well-established law and if they should have realized that their conduct was illegal.

Refer to to "temperate" tone of dissent - e.g. p 30

The Court now applies the dissenting view in *Butz* to the office of the President: A President acting within the outer boundaries of what Presidents normally do may, without liability, deliberately cause serious injury to any number of citizens even though he knows his conduct violates a statute or ~~examples~~ on the constitutional rights of those who are injured. Even if the President in this case ordered Fitzgerald fired by means of a trumped-up reduction in force, knowing

Our op - damage suit liability only

that such a discharge was contrary to the civil service laws, he would be absolutely immune from suit. By the same token, if a President, without following the statutory procedures which he knows apply to himself as well as to other federal officials, orders his subordinates to wiretap or break into a home for the purpose of installing a listening device, and the officers comply with his request, the President would be absolutely immune from suit. He would be immune regardless of the damage he inflicts, regardless of how violative of the statute and of the Constitution he knew his conduct to be, and regardless of his purpose.[1]

Crime But cf p 15

The Court intimates that its decision is grounded in the Constitution. If that is the case, Congress can not provide a remedy against presidential misconduct and that the criminal laws of the United States are wholly inapplicable to the President. I find this approach completely unacceptable. I do not agree that if the office of President is to operate effectively, the holder of that office must be permitted, without fear of liability and regardless of the function he is performing, deliberately to inflict injury on others by conduct that he knows violates the law.

We have not taken such a scatter-gun approach in other cases. *Butz* held that absolute immunity did not attach to the office held by a member of the President's Cabinet but only to the specific functions performed by that officer for which absolute immunity is clearly essential. Members of Congress are absolutely immune under the Speech or Debate Clause of the Constitution, but the immunity extends only to their legislative acts. We have never held that in order for legislative work to be done, it is necessary to immunize all of the tasks that legislators must perform. Constitutional immunity does not extend to those many things that Senators and Representatives regularly and necessarily do that are not legislative acts. Members of Congress, for example, re-

[1] This, of course, is not simply a hypothetical example. See *Kissinger* v. *Halperin*, *aff'd* by an equally divided Court, 452 U. S. 713 (1981).

peatedly importune the executive branch and administrative agencies outside hearing rooms and legislative halls, but they are not immune if in connection with such activity they deliberately violate the law. *United States* v. *Brewster*, 408 U. S. 501 (1972), for example, makes this clear. Neither is a Member of Congress or his aide immune from damage suits if in order to secure information deemed relevant to a legislative investigation, he breaks into a house and carries away records. *Gravel* v. *United States*, 408 U. S. 606 (1972). Judges are absolutely immune from liability for damages, but only when performing a judicial function, and even then they are subject to criminal liablity. See *Dennis* v. *Sparks*, 449 U. S. 24, 31 (1980), *O'Shea* v. *Littleton*, 414 U. S. 488, 503 (1974). The absolute immunity of prosecutors is likewise limited to the prosecutorial function. A prosecutor who directs that an investigation be carried out in a way that is patently illegal is not immune.

In *Marbury* v. *Madison*, the Court, speaking through the Chief Justice, observed that while there were "important political powers" committed to the President for the performance of which neither he nor his appointees were accountable in court, "the question, whether the legality of the act of the head of a department be examinable in a court of justice or not, must always depend on the nature of that act." 1 Cranch, 137, 165 (1803). The Court nevertheless refuses to follow this course with respect to the President. It makes no effort to distinguish categories of presidential conduct that should be absolutely immune from other categories of conduct that should not qualify for that level of immunity. The Court instead concludes that whatever the President does and however contrary to law he knows his conduct to be, he may, without fear of liability, injure federal employees or any other person within or without the government.

Attaching absolute immunity to the office of the President, rather than to particular activities that the President might perform, places the President above the law. It is a rever-

sion to the old notion that the King can do no wrong. Until now, this concept had survived in this country only in the form of sovereign immunity. That doctrine forecloses suit against the government itself and against government officials, but only when the suit against the latter actually seeks relief against the sovereign. *Larsen* v. *Domestic and Foreign Corp.*, 337 U. S. 682, 687 (1949). Suit against an officer, however, may be maintained where it seeks specific relief against him for conduct contrary to his statutory authority or to the Constitution. *Id.*, at 698. Now, however, the Court clothes the office of the President with sovereign immunity, placing it beyond the law.

In *Marbury* v. *Madison*, *supra*, at 163, the Chief Justice, speaking for the Court, observed that the "Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to observe this high appellation, if the laws furnish no remedy for the violation of a vested legal right." Until now, the Court has consistently adhered to this proposition. In *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974), a unanimous Court held that the governor of a state was entitled only to a qualified immunity. We reached this position, even though we recognized that

> "[i]n the case of higher officers of the executive branch—the inquiry is far more complex since the range of decisions and choices—whether the formulation of policy, of legislation, of budgets, or of day-to-day decisions—is virtually infinite—in short, since the options which the chief executive and his principal subordinates must consider are far broader and far more subtle than those made by officials with less responsibility, the range of discretion must be comparably broad." *Id.*, at 246, 247.

As JUSTICE BRENNAN observed in *McGautha* v. *California*, 402 U. S. 183, 252 (dissenting opinion), "The principle that our government shall be of laws and not of men is so

strongly woven into our constitutional fabric that it has found recognition in not just one but several provisions of the Constitution" (footnote omitted). And as THE CHIEF JUSTICE said in *Complete Auto Transit, Inc.* v. *Reis*, 451 U. S. 401, 429 (1981) (dissenting opinion):

> "Accountability of each individual for individual conduct lies at the core of all law—indeed, of all organized societies. The trend to eliminate or modify sovereign immunity is not an unrelated development; we have moved away from 'the king can do no wrong.' The principle of individual accountability is fundamental if the structure of an organized society is not to be eroded to anarchy and impotence, and it remains essential in civil as well as criminal justice."

Unfortunately, the Court now abandons basic principles that have been powerful guides to decision. It is particularly unfortunate since the judgment in this case has few, if any, indicia of a judicial decision; it is almost wholly a policy choice, a choice that is without substantial support and that in all events is ambiguous in its reach and import.

not a judicial decision - policy choice

I agree with the Court's observation that "the law of privilege as a defense to damage actions against officers of government has 'in large part been of judicial making.'" *Butz* v. *Economou*, 438 U. S. at 501–502 (1978), quoting *Barr* v. *Mateo*, 360 U. S. 564, 569 (1959). But this does not mean that the Court has simply "enacted" its own view of the best public policy. No doubt judicial convictions about public policy—whether and what kind of immunity is necessary or wise—have played a part, but the courts have been guided and constrained by common-law tradition, the relevant statutory background and our constitutional structure and history. Our cases dealing with the immunity of members of Congress are constructions of the Speech or Debate Clause and are guided by the history of such privileges at common law. The decisions dealing with the immunity of state officers involve

guided by history

the question of whether and to what extent Congress intended to abolish the common law privileges by providing a remedy in the predecessor of 42 U. S. C. § 1983 for constitutional violations by state officials. Our decisions respecting immunity for federal officials, including absolute immunity for judges, prosecutors and those officials doing similar work, also in large part reflect common law views, as well as judicial conclusions as to what privileges are necessary if particular functions are to be performed in the public interest.

Unfortunately, there is little of this approach in the Court's decision today. A footnote casually, but candidly, abandons the functional approach to immunity that has run through all of our decisions. *Ante*, at n. 35. Indeed, the majority turns this rule on its head by declaring that because the functions of the President's office are so varied and diverse and some of them so profoundly important, the office is unique and must be clothed with office-wide, absolute immunity. This is policy, not law, and in my view, very poor policy.

I

In declaring the President to be absolutely immune from suit for any deliberate and knowing violation of the Constitution or of a federal statute, the Court asserts that the immunity is "rooted in the constitutional tradition of the separation of powers and justified by considerations of public policy." *Ante*, at 17. The decision thus has all the earmarks of a constitutional pronouncement—absolute immunity for the President's office is mandated by the Constitution. Although the Court appears to disclaim this, *ante* at n. 27, it is difficult to read the opinion coherently as standing for any narrower proposition: Attempts to subject the President to liability either by Congress through a statutory action or by the courts through a *Bivens* proceeding would violate the separation of powers.[2] Such a generalized absolute immunity cannot be

[2] On this point, I am in agreement with the concurring memorandum of

sustained when examined in the traditional manner and in light of the traditional judicial sources.

The petitioner and the Solicitor General, as amicus,[3] rely principally on two arguments to support the claim of absolute immunity for the President from civil liability: absolute immunity is an "incidental power" of the Presidency, historically recognized as implicit in the Constitution, and absolute immunity is required by the separation of powers doctrine. I will address each of these contentions.

The Speech or Debate Clause, Art. I, § 6, guarantees absolute immunity to members of Congress; nowhere, however, does the Constitution directly address the issue of presidential immunity.[4] Petitioner nevertheless argues that the debates at the Constitutional Convention and the early history of constitutional interpretation demonstrate an implicit assumption of absolute presidential immunity. In support of this position, petitioner relies primarily on three separate items: First, preratification remarks made during the discussion of presidential impeachment at the Convention and in *The Federalist*; second, remarks made during the meeting of the first Senate; and third, the views of Justice Story.

The debate at the Convention on whether or not the President should be impeachable did touch on the potential dangers of subjecting the President to the control of another branch, the Legislature.[5] Governor Morris, for example,

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THE CHIEF JUSTICE.

[3] The Solicitor General relies entirely upon the brief filed by his office in *Kissinger* v. *Halperin*, *supra*.

[4] In fact, insofar as the Constitution addresses the issue of Presidential liability its approach is very different from that taken in the Speech or Debate Clause. The possibility of impeachment assures that the President can be held accountable to the other branches of Government for his actions; the Constitution further states that impeachment does not bar criminal prosecution.

[5] The debate is recorded in 2 M. Farrand, Records of the Federal Convention of 1787, 64–69 (1934).

complained of the potential for dependency and argued that "[the President] can do no criminal act without Coadjutors who may be punished. In case he should be re-elected, that will be sufficient proof of his innocence."[6] Col. Mason responded to this by asking if "any man [shall] be above Justice" and argued that this was least appropriate for the man "who can commit the most extensive injustice."[7] Madison agreed that "it [is] indispensable that some provision should be made for defending the Community against the incapacity, negligence or perfidy of the chief Magistrate."[8] Pinkney responded on the other side, believing that if granted the power, the Legislature would hold impeachment "as a rod over the Executive and by that means effectually destroy his independence."[9]

Petitioner concludes from this that the delegates meant impeachment to be the exclusive means of holding the President personally responsible for his misdeeds, outside of electoral politics. This conclusion, however, is hardly supported by the debate. Although some of the delegates expressed concern over limiting presidential independence, the delegates voted eight to two in favor of impeachment. Whatever the fear of subjecting the President to the power of another branch, it was not sufficient, or at least not sufficiently shared, to insulate the President from political liability in the impeachment process.

Moreover, the Convention debate did not focus on wrongs the President might commit against individuals, but rather on whether there should be a method of holding him accountable for what might be termed wrongs against the state.[10]

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[6] *Id.*, at 64.
[7] *Id.*, at 65.
[8] *Ibid.*
[9] *Id.*, at 66.
[10] In Federalist No. 65, Hamilton described impeachable offenses as follows: "They are of a nature which may with peculiar propriety be denominated political, as they relate chiefly to injuries done immediately to the

Thus, examples of the abuses that concerned delegates were betrayal, oppression, and bribery; the delegates feared that the alternative to an impeachment mechanism would be "tumults and insurrections" by the people in response to such abuses. The only conclusions that can be drawn from this debate are that the independence of the Executive was not understood to require a total lack of accountability to the other branches and that there was no general desire to insulate the President from the consequences of his improper acts.

Much the same can be said in response to petitioner's reliance on *The Federalist* No. 77. In that essay, Hamilton asked whether the presidency combines "the requisites to safety in the republican sense—a due dependence on the people—a due responsibility." He answered that the constitutional plan met this test because it subjected the President to both the electoral process and the possibility of impeachment, including subsequent criminal prosecution. Petitioner concludes from this that these were intended to be the exclusive means of restraining presidential abuses. This, by no means follows. Hamilton was concerned in Federalist No. 77, as were the delegates at the Convention, with the larger political abuses,—"wrongs against the state"—that a President might commit. He did not consider what legal means might be available for redress of individualized grievances.

That omission should not be taken to imply exclusion in these circumstances is well illustrated by comparing some of the remarks made in the state ratifying conventions with Hamilton's discussion in No. 77. In the North Carolina ratifying convention, for example, there was a discussion of the adequacy of the impeachment mechanism for holding executive officers accountable for their misdeeds. Governor Johnson defended the constitutional plan by distinguishing three legal mechanisms of accountability:

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society itself."

> "If an officer commits an offence against an individual, he is amenable to the courts of law. If he commits crimes against the state, he may be indicted and punished. Impeachment only extends to high crimes and misdemeanors in a *public office*. It is a mode of trial pointed out for great misdemeanors against the public." [11]

Governor Johnson surely did not contemplate that the availability of an impeachment mechanism necessarily implied the exclusion of other forms of legal accountability; rather, the method of accountability was to be a function of the character of the wrong. Mr. Maclaine, another delegate to the North Carolina Convention, clearly believed that the courts would remain open to individual citizens seeking redress from injuries caused by presidential acts:

> "The President is the superior officer, who is to see the laws put in execution. He is amenable for any maladministration in his office. Were it possible to suppose that the President should give wrong instructions to his deputies, whereby the citizens would be distressed, they would have redress in the ordinary courts of common law." [12]

A similar distinction between different possible forms of presidential accountability was drawn by Mr. Wilson at the Pennsylvania ratifying convention:

> "[The President] is placed high, and is possessed of power far from being contemptible; yet not a *single privilege* is annexed to his character; far from being above the laws, he is amenable to them in his private character as a citizen, and in his public character by *impeachment*." [13]

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[11] 4 Elliot's Debates on the Federal Constitution, at 43.
[12] *Id.*, at 47.
[13] 2 Elliot 480.

There is no more reason to respect the views of Hamilton than those of Wilson: both were members of the constitutional convention; both were instrumental in securing the ratification of the Constitution. But more importantly, there is simply no express contradiction in their statements. Petitioner relies on an inference drawn from silence to create this contradiction. The surrounding history simply does not support this inference.

The second piece of historical evidence cited by petitioner is an exchange at the first meeting of the Senate, involving Vice-President Adams and Senators Ellsworth and MacClay. The debate started over whether or not the words "the President" should be included at the beginning of Federal writs, similar to the manner in which English writs ran in the King's name. Senator MacClay thought that this would improperly combine the executive and judicial branches. This, in turn, led to a discussion of the proper relation between the two. Senator Ellsworth and Vice-President Adams defended the proposition that

> "the President, personally, was not subject to any process whatever; could have no action, whatever, brought against him; was above the power of judges, justices, &c. For [that] would put it in the power of a common justice to exercise any authority over him, and stop the whole machine of government."[14]

In their view the impeachment process was the exclusive form of process available against the President. Senator MacClay ardently opposed this view and put the case of a President committing "murder in the street." In his view, in such a case neither impeachment nor resurrection were the exclusive means of holding the President to the law; rather, there was "loyal justice." Senator MacClay, who recorded

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[14] W. Maclay, Sketches of Debate in the First Senate of the United States in 1789–1791, 152 (1969).

later Chief Justice

the exchange, concludes his notes with the remark that none of this "is worth minuting, but it shows clearly how amazingly fond of the old leaven many people are."[15] In his view, Senator Ellsworth and his supporters had not fully comprehended the difference in the political position of the American President and that of the British monarch. Again, nothing more can be concluded from this than that the proper scope of presidential accountability, including the question whether the President should be subject to judicial process, was no clearer then than it is now.

The final item cited by petitioner clearly supports his position, but is of such late date that it contributes little to understanding the original intent. In his Commentaries on the Constitution, published in 1833, Justice Story described the "incidental powers" of the President:

> "Among these must necessarily be included the power to perform [his functions] without any obstruction or impediment whatsoever. The President cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability. In the exercise of his political powers he is to use his own discretion, and he is accountable only to his country and to his own conscience. His decision in relation to these powers is subject to no control, and his discretion, when exercised, is conclusive."[16]

While Justice Story may have been firmly committed to this view in 1833, Senator Pinckney, a delegate to the Convention, was as firmly committed to the opposite view in 1800.[17]

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[15] *Ibid.*

[16] 2 J. Story, Commentaries on the Constitution 372 (1873).

[17] It is not possible to determine whether this is the same Pinckney that Madison recorded as Pinkney, who objected at the Convention to granting

Senator Pinckney, arguing on the floor of the Senate, contrasted the privileges extended to members of Congress by the Constitution with the lack of any such privileges extended to the President.[16] He argued that this was a deliberate choice of the delegates to the Convention, who "well knew how oppressively the power of undefined privileges had been exercised in Great Britain, and were determined no such authority should ever be exercised here." Therefore, "[n]o privilege of this kind was intended for your Executive, nor any except that . . . for your Legislature."

In previous immunity cases the Court has emphasized the importance of the immunity afforded the particular government official at common law. See *Imbler* v. *Pachtman*, 424 U. S. 409, 421 (1976). Clearly this sort of analysis is not possible when dealing with an office, the presidency, that did not exist at common law. To the extent that historical inquiry is appropriate in this context, it is constitutional history, not common law, that is relevant. From the history discussed above, however, all that can be concluded is that absolute immunity from civil liability for the President finds no firm support in constitutional text or history, or in the explanations of

common law — but we have the experience of nearly 200 yrs

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a power of impeachment to the Legislature. Two Charles Pinckneys attended the Convention. Both were from South Carolina. See 3 M. Farrand, *supra*, at 559.

[16] Senator Pinckney's comments are recorded at 10 Annals of Congress 69–83. Petitioner contends that these remarks are not relevant because they concerned only the authority of Congress to inquire into the origin of an allegedly libelous newspaper article. Reply Brief for Petitioner, at 7. Although this was the occasion for the remarks, Pinckney did discuss the immunity of members of Congress as a privilege embodied in the Speech or Debate Clause: "our Constitution supposes no man . . . to be infallible, but considers them all as mere men, to be subject to all the passions and frailties, and crimes, that men generally are, and accordingly provides for the trial of such as ought to be tried, and leaves the members of the Legislature, for their proceedings, to be amenable to their constituents and to public opinion. . . ." This, then, was one of the privileges of Congress that he was contrasting with those extended (or not extended) to the President.

the early commentators. This is too weak a ground to support a declaration by this Court that the President is absolutely immune from civil liability, regardless of the source of liability or the injury for which redress is sought. This much the majority implicitly concedes since history and text, traditional sources of judicial argument, merit only a brief footnote in the Court's opinion. *Ante*, at n. 32.

Says we relegate history to a FN.

B

No bright line can be drawn between arguments for absolute immunity based on the constitutional principle of separation of powers and arguments based on what the Court refers to as "public policy." This necessarily follows from the Court's functional interpretation of the separation of powers doctrine:

> "[I]n determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions." *Nixon* v. *Administrator of General Services*, 433 U. S. 425, 443 (1977).

See also *United States* v. *Nixon*, 418 U. S. 683, 706–707 (1974); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 579, 635 (1952) (Jackson, J., concurring). Petitioner argues that public policy favors absolute immunity because absent such immunity the President's ability to execute his constitutionally mandated obligations will be impaired. The convergence of these two lines of argument is superficially apparent from the very fact that in both instances the approach of the Court has been characterized as a "functional" analysis.

The difference is only one of degree. While absolute immunity might maximize executive efficiency and therefore be a worthwhile policy, lack of such immunity may not so disrupt the functioning of the presidency as to violate the separation of powers doctrine. Insofar as liability in this case is

of congressional origin, petitioner must demonstrate that subjecting the President to a private damages action will prevent him from "accomplishing [his] constitutionally assigned functions." Insofar as liability is based on a *Bivens* action, perhaps a lower standard of functional disruption is appropriate. Petitioner has surely not met the former burden; I do not believe that he has met the latter standard either.

Taken at face value, the Court's position that as a matter of constitutional law the President is absolutely immune should mean that he is immune not only from damages actions but also from suits for injunctive relief, criminal prosecutions and, indeed, from any kind of judicial process. But there is no contention that the President is immune from criminal prosecution in the courts under the criminal laws enacted by Congress or by the states for that matter. Nor would such a claim be credible. The Constitution itself provides that impeachment shall not bar "Indictment, Trial, Judgment, and Punishment, according to Law." Article I, Section II, Clause VII. Similarly, our cases indicate that immunity from damages actions carries no protection from criminal prosecution. *Supra*, at 3.

Neither can there be a serious claim that the separation of powers doctrine insulates presidential action from judicial review or insulates the President from judicial process. No argument is made here that the President, whatever his liability for money damages, is not subject to the courts' injunctive powers. See, *e. g., Youngstown Sheet & Tube Co.*, supra; *Korematsu* v. *United States*, 323 U. S. 214 (1944); *Panama Refining Co.* v. *Ryan*, 293 U. S. 38 (1935). Petitioner's attempt to draw an analogy to the Speech or Debate Clause, Brief, at 45, one purpose of which is "to prevent accountability before a possibly hostile judiciary," *Gravel* v. *United States*, 408 U. S., 606, 617 (1972), breaks down at just this point. While the Speech or Debate Clause guarantees that "for any Speech or Debate" congressmen "shall not be questioned in any other Place," and, thus, assures that congress-

men, in their official capacity, shall not be the subject of the courts' injunctive powers, no such protection is afforded the Executive. Indeed, as the cases cited above indicate, it is the rule, not the exception, that executive actions—including those taken at the immediate direction of the President—are subject to judicial review.[13] Regardless of the possibility of money damages against the President, then, the constitutionality of the President's actions or their legality under the applicable statutes can and will be subject to review. Indeed, in this very case, respondent Fitzgerald's dismissal was set aside by the Civil Service Commission as contrary to the applicable regulations issued pursuant to authority granted by Congress.

Nor can private damages actions be distinguished on the ground that such claims would involve the President personally in the litigation in a way not necessitated by suits seeking declaratory or injunctive relief against certain presidential actions. The President has been held to be subject to judicial process at least since 1807. *Aaron Burr* case, 25 Fed. Cas. 30 (1807) (Chief Justice Marshall, sitting as circuit justice). *Burr* "squarely ruled that a subpoena may be directed to the President." *Nixon* v. *Sirica*, 487 F. 2d 700, 709 (DC Cir. 1973). Chief Justice Marshall flatly rejected any suggestion that all judicial process, in and of itself, constitutes an unwarranted interference in the Presidency:

> "The guard, furnished to this high officer, to protect him from being harassed by *vexatious* and *unnecessaary* subpoenas, is to be looked for in the conduct of a court after those subpoenas have issued; not in any circumstance which is to precede their being issued." 25 Fed. Cas., at 34.

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[13] The Solicitor General, in fact, argues that the possibility of judicial review of presidential actions supports the claim of absolute immunity: Judicial review "serves to contain and correct the unauthorized exercise of the President's power," making private damages actions unnecessary in order to achieve the same end. Brief, at 31 (see n. 3).

This position was recently rearticulated by the Court in *United States* v. *Nixon*, 418 U. S. 683, 706 (1974):

> "Neither the doctrine of separation of powers, nor the need for confidentiality . . . without more, can sustain an absolute, unqualified presidential privilege of immunity from judicial process under all circumstances."

These two lines of cases establish then that neither subjecting presidential actions to a judicial determination of their constitutionality, nor subjecting the President to judicial process violates the separation of powers doctrine. Similarly, neither has been held to be sufficiently intrusive to justify a judicially declared rule of immunity. With respect to intrusion by the judicial process itself on Executive functions, subjecting the President to private claims for money damages involves no more than this. If there is a separation of powers problem here, it must be found in the nature of the *remedy* and not in the *process* involved.

We said in *Butz* v. *Economou*, 438 U. S. 478 (1978), that "it is not unfair to hold liable the official who knows or should know he is acting outside the law, and . . . insisting on an awareness of clearly established constitutional limits will not unduly interfere with the exercise of official judgment." *Id.* at 506–507. Today's decision in *Harlow* v. *Fitzgerald*, No. 80–945, makes clear that the President, were he subject to civil liability, could be held liable only for an action that he knew, or as an objective matter should have known, was illegal and a clear abuse of his authority and power. In such circumstances, the question that must be answered is who should bear the cost of the resulting injury—the wrongdoer or the victim.

The principle that should guide the Court in deciding this question was stated long ago by Chief Justice Marshall: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury* v. *Madison*, 1 Cranch 137, 163 (1803). Much more recently, the Court considered

the role of a damages remedy in the performance of the courts' traditional function of enforcing federally guaranteed rights: "Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388, 395 (1971).[30] To the extent that the Court denies an otherwise appropriate remedy, it denies the victim the right to be made whole and, therefore, denies him "the protection of the laws."

That the President should have the same remedial obligations toward those whom he injures as any other federal officer is not a surprising proposition. The fairness of the remedial principle the Court has so far followed—that the wrongdoer, not the victim, should ordinarily bear the costs of the injury—has been found to be outweighed only in instances where potential liability is "thought to injure the governmental decisionmaking process." *Imbler* v. *Pachtman*, 424 U. S. 409, 437 (1976) (WHITE, J., concurring). The argument for immunity is that the possibility of a damages action will, or at least should, have an effect on the performance of official responsibilities. That effect should be to deter unconstitutional, or otherwise illegal, behavior. This may, however, lead officers to be more careful and "less vigorous" in the performance of their duties. Caution, of course, is not always a virtue and undue caution is to be avoided.

The possibility of liability may, in some circumstances, distract officials from the performance of their duties and influence the performance of those duties in ways adverse to the public interest. But when this "public policy" argument in favor of absolute immunity is cast in these broad terms, it applies to all officers, both state and federal: All officers should

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[30] See also Justice Harlan's discussion of the appropriateness of the damages remedy in order to redress the violation of certain constitutional rights. *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388, 407–410 (1971) (Harlan, J. concurring).

perform their responsibilities without regard to those personal interests threatened by the possibility of a lawsuit. See *Imbler*, *supra*, at 436 (1976) (WHITE, J., concurring).[21] Inevitably, this reduces the public policy argument to nothing more than an expression of judicial inclination as to which officers should be encouraged to perform their functions with "vigor," although with less care.[22]

The Court's response, until today, to this problem has been to apply the argument to individual functions, not offices, and to evaluate the effect of liability on governmental decisionmaking within that function, in light of the substantive ends that are to be encouraged or discouraged. In this case, therefore, the Court should examine the functions implicated by the causes of action at issue here and the effect of potential liability on the performance of those functions.

II

The functional approach to the separation of powers doctrine and the Court's more recent immunity decisions[23] converge on the following principle: The scope of immunity is determined by function, not office. The wholesale claim that the President is entitled to absolute immunity in all of his actions stands on no firmer ground than did the claim that all presidential communications are entitled to an absolute privilege, which was rejected in favor of a functional analysis, by a unanimous Court in *United States* v. *Nixon*, supra. There-

Judge w/in outer limits of his authority

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[21] The Court has never held that the "public policy" conclusions it reaches as to the appropriateness of absolute immunity in particular instances are not subject to reversal through congressional action. Implicity, therefore, the Court has already rejected a constitutionally-based, separation of powers argument for immunity for federal officials.

[22] Surely the fact that officers of the court have been the primary beneficiaries of this Court's pronouncements of absolute immunity gives support to this appearance of favoritism.

[23] See *Supreme Court of Virginia* v. *Consumers Union of the United States*, 446 U. S. 719 (1980); *Butz*, supra, at 511.

fore, whatever may be true of the necessity of such a broad immunity in certain areas of executive responsibility,[24] the only question that must be answered here is whether the dismissal of employees falls within a constitutionally assigned executive function, the performance of which would be substantially impaired by the possibility of a private action for damages. I believe it does not.

Respondent has so far proceeded in this action on the basis of three separate causes of action: two federal statutes—5 U. S. C. § 7211 and 18 U. S. C. § 1505—and the First Amendment. At this point in the litigation, the availability of these causes of action is not before us. Assuming the correctness of the the lower court's determination that the two federal statutes create a private right of action, I find the suggestion that the President is immune from those causes of action to be unconvincing. The attempt to found such immunity upon a separation of powers argument is particularly unconvincing.

The first of these statutes, 5 U. S. C. § 7211, states that "[t]he right of employees . . . to . . . furnish information to either House of Congress, or to a committee or a Member thereof, may not be interfered with or denied." The second, 18 U. S. C. § 1505, makes it a crime to obstruct congressional testimony. It does not take much insight to see that at least one purpose of these statutes is to assure congressional access to information in the possession of the Executive Branch, which Congress believes it requires in order to carry out its responsibilities.[25] Insofar as these statutes implicate

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[24] I will not speculate on the presidential functions which may require absolute immunity, but a clear example would be instances in which the President participates in prosecutorial decisions.

[25] See, *e. g.*, 48 Cong. Rec. 4653 (1912) ("During my first session of Congress I was desirous of learning the needs of the postal service and inquiring into the conditions of the employees. To my surprise I found that under an Executive order these civil service employees could not give me any information.") (remarks of Rep. Calder); *id.*, at 4656 ("I believe it is

a separation of powers argument, I would think it to be just the opposite of that suggested by petitioner and accepted by the majority. In enacting these statutes, Congress sought to preserve its own constitutionally mandated functions in the face of a recalcitrant Executive.[26] Thus, the separation of powers problem addressed by these statutes was first of all presidential behavior that intruded upon, or burdened, Congress' performance of its own constitutional responsibilities. It is no response to this to say that such a cause of action would disrupt the President in the furtherance of his responsibilities. That approach ignores the separation of powers problem that lies behind the congressional action; it assumes that presidential functions are to be valued over congressional functions.

The argument that by providing a damages action under these statutes (as is assumed in this case) Congress has adopted an unconstitutional means of furthering its ends, must rest on the premise that presidential control of executive employment decisions is a constitutionally assigned presidential function with which Congress may not significantly interfere. This is a frivolous contention. In *United States* v. *Perkins*, 116 U. S. 483, 485 (1886), this Court held

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high time that Congress should listen to the appeals of these men and provide a way whereby they can properly present a petition to the Members of Congress for a redress of grievances without the fear of losing their official positions") (remarks of Rep. Reilly); *id.*, at 5157 ("I have always requested employees to consult with me on matters affecting their interest and believe that it is my duty to listen to all respectful appeals and complaints.") (remarks of Rep. Evans). Indeed, it is for just this reason that petitioners in No. 80–945 argue that the statutes do not create a private right of action: "5 U. S. C. § 7211 and 18 U. S. C. § 1505 were designed to protect the legislative process, not to give one such as Fitzgerald a right to seek damages." Brief for petitioners, at 26, n. 11.

[26] Indeed, the impetus for passage of what is now 5 U. S. C. § 7211 was the imposition of "gag rules" upon testimony of civil servants before congressional committees. See Exec. Order No. 402 (Jan. 25, 1906); Exec. Order No. 1142 (Nov. 26, 1909).

that "when Congress, by law, vests the appointment of inferior officers in the heads of Departments it may limit and restrict the power of removal as it deems best for the public interest." Whatever the rule may be with respect to high officers, see *Humphrey's Executor* v. *United States*, 295 U. S. 602 (1935), with respect to those who fill traditional bureaucratic positions, restrictions on executive authority are the rule and not the exception.[27] This case itself demonstrates, the "severe statutory restraints" under which the President operates in this area.

Fitzgerald was a civil service employee working in the Office of the Secretary of the Air Force. Although his position was such as to fall within the "excepted" service, which would ordinarily mean that Civil Service rules and regulations applicable to removals would not protect him, 5 CFR Part 6, § 6.4, his status as a veteran entitled him to special protections. Veterans are entitled to certain Civil Service benefits afforded to "preference eligibles." 5 U. S. C. § 2108. These benefits include that set forth in 5 U. S. C. §7513(a): "An agency may take [adverse action] against an employee only for such cause as will promote the efficiency of the service." Similarly, his veteran status entitled Fitzgerald to the protection of the reduction in force procedures established by civil service regulation. 5 U. S. C. §§ 3501–3502. It was precisely those procedures that the Chief Examiner for the Civil Service Commission found had been violated, in his 1973 recommendation that respondent be reappointed to his old position or to a job of comparable authority.

This brief review is enough to illustrate my point: Personnel decisions of the sort involved in this case are emphatically not a constitutionally assigned presidential function that will

[27] Thus, adverse action may generally be taken against civil servants only "for such cause as will promote the efficiency of the service." 5 U. S. C. §§ 7503, 7513 and 7543.

tolerate no interference by either of the other two branches of government. More important than this "quantitative" analysis of the degree of intrusion in presidential decisionmaking permitted in this area, however, is the "qualitative" anaylsis suggested in § I(B) above.

Absolute immunity is appropriate when the threat of liability may bias the decisionmaker in ways that are adverse to the public interest. But as the various regulations and statutes protecting civil servants from arbitrary executive action illustrate, this is an area in which the public interest is demonstrably on the side of encouraging less "vigor" and more "caution" on the part of decisionmakers. That is, the very steps that Congress has taken to assure that executive employees will be able freely to testify in Congress and to assure that they will not be subject to arbitrary adverse actions indicate that those policy arguments that have elsewhere justified absolute immunity are not applicable here. Absolute immunity would be nothing more than a judicial declaration of policy that directly contradicts the policy of protecting civil servants reflected in the statutes and regulations.

If respondent could, in fact, have proceeded on his two statutory claims, the *Bivens* action would be superfluous. Respondent may not collect damages twice, and the same injuries are put forward by respondent as the basis for both the statutory and constitutional claims. As we have said before, "were Congress to create equally effective alternative remedies, the need for damages relief [directly under the Constitution] might be obviated." *Davis* v. *Passman*, 442 U. S. 228, 248 (1979). Nevertheless, because the majority decides that the President is absolutely immune from a *Bivens* action as well, I shall express by disagreement with that conclusion.

In *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388 (1971), we held that individuals who have suffered a compensable injury through a violation of the rights guaranteed them by the Fourth Amendment may invoke the general federal-question jurisdiction of the federal courts in a

suit for damages. That conclusion rested on two principles: First, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws," 403 U. S., at 397, quoting *Marbury* v. *Madison*, 1 Cranch 137, 163 (1803); second, "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." 403 U. S., at 395. In *Butz* v. *Economou*, 438 U. S. 478 (1977), we rejected the argument of the federal government that federal officers, including cabinet officers, are absolutely immune from civil liability for such constitutional violations—a position that we recognized would substantially undercut our conclusion in *Bivens*. We held there that although the performance of certain limited functions will be protected by the shield of absolute immunity, the general rule is that federal officers, like state officers, have only a qualified immunity. Finally, in *Davis* v. *Passman*, 442 U. S. 228 (1979), we held that a Congressman could be held liable for damages in a *Bivens*-type suit brought in federal court alleging a violation of individual rights guaranteed the plaintiff by the Due Process Clause. In my view, these cases have largely settled the issues raised by the *Bivens* apsect of this case.

Bivens cases

These cases established the following principles. First, it is not the exclusive prerogative of the legislative branch to create a federal cause of action for a constitutional violation. In the absence of adequate legislatively prescribed remedies, the general federal-question jurisdiction of the federal courts permits the courts to create remedies, both legal and equitable, appropriate to the character of the injury. Second, exercise of this "judicial" function does not create a separation of powers problem: We have held both executive and legislative officers subject to this judicially created cause of action and in each instance we have rejected separation of powers arguments. Holding federal officers liable for damages for constitutional injuries no more violates separation of powers principles than do the equitable remedies that result from the

traditional function of judicial review. Third, federal officials will generally have a "qualified immunity" from such suits; absolute immunity will be extended to certain functions only on the basis of a showing that exposure to liability is inconsistent with the proper performance of the official's duties and responsibilities. Finally, Congress retains the power to restrict exposure to liability, and the policy judgments implicit in this decision should properly be made by Congress.

The majority fails to recognize the force of what the Court has already done in this area. Under the above principles, the President could not claim that there are no circumstances under which he would be subject to a *Bivens*-type action for violating respondent's constitutional rights. Rather, he must assert that the absence of absolute immunity will substantially impair his ability to carry out particular functions that are his constitutional responsibility. For the reasons I have presented above, I do not believe that this argument can be successfully made under the circumstances of this case.

It is, of course, theoretically possible, that the President should be held to be absolutely immune because each of the functions for which he has constitutional responsibility would be substantially impaired by the possibility of civil liability. I do not think this argument is valid for the simple reason that the function involved here does not have this character. Which side of the line other presidential functions would fall on need not be decided in this case.

The majority opinion suggests a variant of this argument. It argues, not that every presidential function has this character, but that distinguishing the particular functions involved in any given case would be "difficult." *Ante*, at n. 35.[28] Even if this were true, it would not necessarily follow

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[28] The majority also seems to believe that by "function" the Court has in the past referred to "subjective purpose." See *ante*, at n. 35 ("judges frequently would need to inquire into the *purpose* for which acts were

that the President is entitled to absolute immunity: That would still depend on whether, in those unclear instances, it is likely to be the case that one of the functions implicated deserves the protection of absolute immunity. In this particular case, I see no such function.[29]

I do not believe that subjecting the President to a *Bivens* action would create separation of powers problems or "public policy" problems different from those involved in subjecting the President to a statutory cause of action.[30] Relying upon the history and text of the Constitution, as well as the analytic method of our prior cases, I conclude that these problems are not sufficient to justify absolute immunity for the President in general, nor under the circumstances of this case in particular.

III

Because of the importance of this case, it is appropriate to examine the reasoning of the majority opinion.

The opinion suffers from serious ambiguity even with respect to the most fundamental point: How broad is the immu-

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taken."). I do not read our cases that way. In *Stump* v. *Sparkman*, 435 U. S. 349, 362 (1978), we held that the factors determining whether a judge's act was a "judicial action" entitled to absolute immunity "relate to the nature of the act itself, *i. e.*, whether it is a function normally performed by a judge, and to the expectations of the parties." Neither of these factors required any analysis of the purpose the judge may have had in carrying out the particular action. Similarly in *Butz* v. *Economou*, 438 U. S. 478, 512–516 (1977), when we determined that certain executive functions were entitled to absolute immunity because they shared "enough of the characteristics of the judicial process," we looked to objective qualities and not subjective purpose.

[29] The majority seems to suggest that responsibility for governmental reorganizations is one such function. *Ante*, at n. 35. I fail to see why this should be so.

[30] Although our conclusions differ, the majority opinion reflects a similar view as to the relationship between the two sources of the causes of action in this case: It does not believe it necessary to differentiate in its own analysis between the statutory and constitutional causes of action.

nity granted the President? The opinion suggests that its scope is limited by the fact that under none of the asserted causes of action "has Congress taken express legislative action to subject the President to civil liability for his official acts." *Ante*, at 17. We are never told, however, how or why Congressional action could make a difference. It is not apparent that any of the propositions relied upon by the majority to immunize the President would not apply equally to such a statutory cause of action; nor does the majority indicate what new principles would operate to undercut those propositions.

In the end, the majority seems to overcome its initial hesitation, for it announces that, "[w]e consider [absolute] immunity a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and justified by considerations of public policy," *ibid.* See also *id.*, at 23 ("A rule of absolute immunity for the President will not leave the Nation without sufficient remedies for misconduct on the part of the chief executive.").[31] There is even a disturbing suggestion that the President may be immune from judicial process in general: "Although this issue has not been faced squarely by the Court, there have been strong statements in previous opinions asserting the immunity of the President from judicial orders." *Ante*, at 21 n. 36.[32] Yet, on the very next page the

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[31] THE CHIEF JUSTICE leaves no doubt that he, at least, reads the majority opinion as standing for the broad proposition that the President is absolutely immune under the Constitution:

"I write separately to emphasize that the presidential immunity spelled out today derives from and is mandated by the Constitution. Absolute immunity for a President is either implicit in the constitutional doctrine of separation of powers or it does not exist." Memorandum of Concurrence, at 1.

[32] Contrary to the suggestion of the majority, *Mississippi* v. *Johnson*, 71 U. S. 475 (1866), carefully reserved the question of whether a court may compel the President himself to perform ministerial executive functions:

"We shall limit our inquiry to the question presented by the objection,

majority recognizes that this issue has long been resolved: "It is settled law that the separation of powers doctrine does not bar every exercise of jurisdiction over the President of the United States." *Ante*, at 22.

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without expressing any opinion on the broader isseus . . . whether, in any case, the President, . . . may be required, by the process of this court, to perform a purely ministerial act under a positive law, or may be held amenable, in any case, otherwise than by impeachment for crime."

Similarly, *Kendall* v. *United States*, 12 Pet. 524 (1838), also cited by the majority, did not indicate that the President could never be subject to judicial process. In fact, it implied just the contrary in rejecting the argument that the mandamus sought involved an unconstitutional judicial infringement upon the Executive Branch:

"The mandamus does not seek to direct or control the postmaster general in the discharage of any official duty, partaking in any respect of an executive character; but to enforce the performance of a mere ministerial act, which neither he nor the president had any authority to deny or control." *Id.*, at 610.

The majority also contends that "strong historical considerations" support this view. The history cited is for the most part that reviewed in § I of this opinion. In addition, it cites a letter by President Jefferson, which it contends demonstrates that "Jefferson believed the President not to be subject to judicial process."

Thomas Jefferson's views on the relation of the President to the judicial process are, however, not quite so clear as the majority suggests. Jefferson took a variety of positions on the proper relation of executive and judicial authority, at different points in his career. It would be suprising if President Jefferson had not argued strongly for such immunity from judicial process, particularly in a confrontation with Chief Justice Marshall. Jefferson's views on this issue before he became President would be of a good deal more significance. In this regard, it is significant that in Jefferson's second and third drafts of the Virginia Constitution, which also proposed a separation of the powers of government into three separate branches, he specifically proposed that the Executive be subject to judicial process: "he shall be liable to action, tho' not to personal restraint for private duties or wrongs." 1 Papers of Thomas Jefferson 350, 360. Also significant is the fact that when Jefferson's followers tried to impeach Justice Chase in 1804–1805, one of the grounds of their attack on him was that he had refused to subpoena President Adams during the trial of Dr. Cooper for sedition. See Corwin, "The President: Office and Powers" 118. Fi-

In *United States* v. *Nixon*, 418 U. S. 683 (1974), we upheld the power of a federal district court to issue a subpoena *duces tecum* against the President. In other cases we have enjoined executive officials from carrying out presidential directives. See *e. g.*, *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952). Not until this case has there ever been a suggestion that the mere formalism of the name appearing on the complaint was more important in resolving separation of powers problems than the substantive character of the judicial intrusion upon executive functions.

The majority suggests that the separation of powers doctrine permits exercising jurisdiction over the President only in those instances where "judicial action is needed to serve broad public interests—as when the Court acts, not in derogation of the separation of powers, but to maintain their proper balance." *Ante*, at 22. Without explanation, the majority contends that a "merely private suit for damages" does not serve this function.

The suggestion that enforcement of the rule of law—*i. e.*, subjecting the President to rules of general applicability—does not further the separation of powers, but rather is in derogation of this purpose, is bizarre. At stake in a suit of this sort, to the extent that it is based upon a statutorily created cause of action, is the ability of Congress to assert legal

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nally, it is worth noting that even in the middle of the debate over Chief Justice Marshall's power to subpoena the President during the Burr trial, Jefferson looked to a legislative solution of the confrontation: "I hope however that . . . at the ensuing session of the legislature [the Chief Justice] may have means provided for giving to individuals the benefit of the testimony of the [Executive] functionaries in proper cases." X Works of Thomas Jefferson, 407 n. (P. Ford Ed. 1905) (quoting a letter from President Jefferson to George Hay, United States District Attorney for Virginia).

Only by virtue of brevity of its analysis can the majority plausably put forth the claim that this history provides "strong" support for a proposition that it admits to being demonstrably untrue one page later.

restraints upon the Executive and of the courts to perform their function of providing redress for legal harm. Regardless of what the Court might think of the merits of Mr. Fitzgerald's claim, the idea that pursuit of legal redress offends the doctrine of separation of powers is a frivolous contention passing as legal argument.

Similarly, the majority implies that the assertion of a constitutional cause of action—the whole point of which is to assure that an officer does not transgress the constutitional limits on his authority—may offend separation of powers concerns. This is surely a perverse approach to the Constitution: Whatever the arguments in favor of absolute immunity may be, it is untenable to argue that subjecting the President to constitutional restrictions will undercut his "unique" role in our system of government. It cannot be seriously argued that the President must be placed beyond the law and beyond judicial enforcement of constitutional restraints upon executive officers in order to implement the principle of separation of powers.

Beyond the law

Focusing on the actual arguments the majority offers for its holding of absolute immunity for the President, one finds suprisingly little. As I read the relevant section of the Court's opinion, I find just three contentions from which the majority draws this conclusion. Each of them is little more than a makeweight; together they hardly suffice to justify the wholesale disregard of our traditional approach to immunity questions.

wholesale disregard of traditional approach

First, the majority informs us that the President occupies a "unique position in the constitutional scheme," including responsibilities for the administration of justice, foreign affairs, and management of the Executive Branch. *Ante*, at 17–18. True as this may be, it says nothing about why a "unique" rule of immunity should apply to the President. The President's unique role may indeed encompass functions for which he is entitled to a claim of absolute immunity. It does not follow from that, however, that he is entitled to absolute immunity either in general or in this case in particular.

For some reason, the majority believes that this uniqueness of the President shifts the burden to respondent to prove that a rule of absolute immunity does not apply. The respondent has failed in this effort, the Court suggests, because the President's uniqueness makes "inapposite" any analogy to our cases dealing with other executive officers. Even if this were true, it would not follow that the President is entitled to absolute immunity; it would only mean that a particular argument is out of place. But the fact is that it is not true. There is nothing in the President's unique role that makes the arguments used in those other cases inappropriate.

Second, the majority contends that because the President is "particularly vulnerable to suits for civil damages," *ante*, at 19, a rule of absolute immunity is required. The force of this argument is surely undercut by the majority's admission that "there is no historical record of numerous suits against the President." *Id*, at n. 34. Even granting that a *Bivens* cause of action did not becomes available until 1971, in the eleven years since then there have been only a handful of suits. Many of these are frivolous and dealt with in a routine manner by the courts and the Justice Department. There is no reason to think that, in the future, the protection afforded by summary judgment procedures would not be adequate to protect the President, as they currently protect other executive officers from unfounded litigation. Indeed, given the decision today in *Harlow & Butterfield* v. *Fitzgerald*, No. 80–945, there is even more reason to believe that frivolous claims will not intrude upon the President's time. Even if judicial procedures were found not to be sufficient, Congress remains free to address this problem if and when it develops.

Finally, the Court suggests that potential liability could "distort the process of decisionmaking" because executive behavior would necessarily be somewhat defensive in character to guard against this possibility. Unless one assumes that the President himself makes the countless high level executive decisions required in the administration of government,

this rule will not do much to insulate such decisions from the threat of liability. The logic of the proposition cannot be limited to the President; its extension, however, has been uniformly rejected by this Court. See *Butz*, *supra*; *Harlow & Butterfield*, *supra*. Furthermore, in no instance have we previously held legal accountability in itself to be an unjustifiable cost. The availability of the courts to vindicate constitutional and statutory wrongs has been perceived and protected as one of the virtues of our system of delegated and limited powers. As I argued in § I, our concern in fashioning absolute immunity rules has been that liability may pervert the decisionmaking process in a particular function by undercutting the values we expect to guide those decisions. The caution that comes from requiring reasonable choices in areas that may intrude on individuals' legally protected rights has never before been counted as a cost.

IV

The majority may be correct in its conclusion that "a rule of absolute immunity will not leave the Nation without sufficient remedies for misconduct on the part of the chief executive." *Ante*, at 23. Such a rule will, however, leave Mr. Fitzgerald without an adequate remedy for the harms that he may have suffered. More importantly, it will leave future plaintiffs without a remedy, regardless of the substantiality of their claims. The remedies in which the Court finds comfort were never designed to afford relief for individual harms. Rather, they were designed as political safety-valves. Politics and history, however, are not the domain of the courts; the courts exist to assure each individual that he, as an individual, has enforcable rights that he may pursue to achieve a peaceful redress of his legitimate grievances.

I find it ironic, as well as tragic, that the Court would so casually discard its own role of assuring "the right of every individual to claim the protection of the laws," *Marbury* v. *Madison*, 1 Cranch 137, 163 (1803), in the name of protecting

the principle of separation of powers. Accordingly, I dissent.

Did he join Stumps ? - p1
Crimes/impeachment - p2

May 12, 1982

TO: MR. JUSTICE POWELL

FROM: DICK FALLON

RE: Nixon v. Fitzgerald

BRW's draft dissent contains few surprises. Under the circumstances I think we should not attempt to provoke a long series of exchanges before the opinion issues. Some changes are needed, however. I have marked suggestions on the attached draft, beginning at page 15 of our opinion. In this cover memo I explain--page by page--what I think the suggested changes would accomplish.

But the language we largely from Butz

Page 15. I think BRW's strongest charge--anticipated earlier by JPS--is that the opinion has included too much policy" language, too few of the indicia of a judicial opinion. "There is no loss from dropping this "policy" sentence."

Look at last Term's opinion re to public polic

Page 16. "Insert A" is a suggested re-write of the deleted paragraphs. It has three aims: (1) to omit certain excess "policy" language; (2) to pin the origin of the "policy" language on BRW's own Butz opinion; and (3) to explain the "policy"

inquiry in terms of structural and functional presuppositions of our institutions of government.

Page 17. The change in text lets us cite Story "upfront" as an exposition of the kind of functional/policy concern on which a court, consistently with the "judicial" role, can rely. The language added to note 27 responds to BRW's claim that Congress must be able to restrain the President in order to protect its own role in the separation of powers. The point essentially is that, whatever its general intentions, it has not shown that it meant to subject the President to damages liability.

Page 19. BRW claims that we present no "arguments" in support of absolute immunity--merely shift the burden of proof. "Insert B" does little more than move the sentences in the paragraph as originally written. It does, however, put the case a bit more affirmativelys--the reason I would recommend its adoption.

Page 20. The change in text is very close to being stylistic. The footnote change responds to the dissent's claim that there would be no need to inquire into the President's motives to perform a division of his functions.

Page 21. BRW alleges that the historical recitation of the footnote engages in overstatement. This seems to me precisely the kind of debate we should avoid--whether a footnote, of only

marginal importance, is shaded a bit too harshly. I think the best way to deal with this criticism is to defuse it.

Page 23. Insert C, to be added to the footnote, responds to BRW's major premise that our jurisprudence assumes a damages remedy for every wrong. In many ways I think this is the ground on which we must meet BRW in order to be persuasive.

Page 24. The suggested footnote--"Insert D"--deals with BRW's rhetorical charge that the Court puts the President "above the law."

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 12, 1982

Re: No. 79-1738 - Nixon v. Fitzgerald

Dear Byron:

Please join me in your dissent.

Sincerely,

T.M.

Justice White

cc: The Conference

lfp/ss 05/15/82

MEMORANDUM

TO: Dick DATE: May 14, 1982

FROM: Lewis F. Powell, Jr.

79-1738 Nixon

My tentative comments - subject to discussion - on suggested changes in our opinion, are as follows:

Pages 15 and 16 - I do not view the fulminating of the dissent about "public policy" necssarily suggests a deemphasis by us on what the Court has said before about reliance on policy in immunity cases. No one has relied more heavily on it than BRW himself. In effect, we are relying on stare decisis.

Having said this, and on a second reading of your changes on 15 and 16, I believe they are an improvement. I suggest we revise the beginning of subpart B along thefollowing lines:

> "Our decisions concerning the immunity of government officials from civil damages liability have been guided primarily by the Constitution, federal statutes, and history. Additionally, at least in the absence of ~~explicity~~ constitutional or congressional guidance, immunity decisions have been informed by the common law. ~~(for example, in cases arising under the inexplicit language of §1983~~). This Court also ~~necessarily~~ has weighed concerns of public policy ~~in light of~~ our history and the structure of our government. (Dick, here cite "public policy" statements from Butts, etc.).

At this point we can pick up - if you agree - the second full paragraph in your insert A.

Page 17. Apart from minor editing, the only change is in note 27. I will address this below.

Page 19. Your insert B is a fine substitute for the present language. I have done minor editing.

Note 35. Although you have made no change in note 35 (not at bottom of your rider B-2), I am not at all sure now thatwe should say that where an official possesses absolute immunity (e.g., a judge), it extends only "to acts in performance of particular function". We hold in this case that presidential immunity extends only to action taken within the scope of his authority - i.e., official duties. If he committed a personal fraud (conspired with a friend to defraud a widow for personal gain), or a personal tort (assault and battery of the President of Americans for Democratic Action), the President would no more have immunity than would the Texas judge who conspired to commit a fraud. See the draft of a footnote that I have dictated.

Page 20. I like the new sentence beginning page 20. I also like the insert proposed for the footnote. If we decide to take the position that I mention above with respect to "functional" analysis, other changes would have

to be made in this note. The central point, however, would remain the same: namely, that because of the scope of the executive power of the United States under our Constitution, the official acts of a President embrace the spectrum of government. Nevertheless, in so acting within the scope of his authority, his motives would be as irrelevant as those of a judge or prosecutor acting judicially or prosecutorially. Drawing distinctions near the "outer perimeter" would be difficult but not impossible.

Page 21. The editing changes are good. I would like to take a look at what we wrote last Term about history before deciding whether to say anything further about it.

Page 23, n. 41. I think your insert is quite good - and an effective answer to BRW.

Page 24, n. 45. This also is helpful.

* * * * *

Now, Dick, I come to your memo of May 14, with the suggested long revision of note 27. We need to talk about this, but my initial reactions are as follows:

I agree that we need to respond to the dissent's implied cause of action theory. In general terms, we could start by saying that the dissent injects into this case the argument that a damages cause of action against the President may be implied from the statutes on which

respondent relies. The issue is not before us (stating why). We address it briefly only because the dissent relies on it. Then, Dick, I would make in summary form the "intent" argument that you made so persuasively in Merrill Lynch. Cite the Court's opinion in Merrill Lynch that turned entirely on intent, Sea Clammers and other relevant cases.

After making clear that intent must be established, I would repeat what we have in present note 27, and follow this with strong statements that there is not a word in the statutes or legislative history that supports an intention to impose a damages liability on the President of the United States. Nor were thre any prior court decisions, such as those relied upon in Merrill Lynch. We might add that in view of other remedies provided expressly in these statutes, our cases also militate against even implying causes of action against any officials. See, e.g. Bush (?).

I would reserve for a final paragraph the answer you have given with respect to a Bivens claim.

L.F.P., Jr.,

ss

May 14, 1982

TO: MR. JUSTICE POWELL

FROM: DICK FALLON

RE: Nixon

Attached is some language drafted as a substitute for the current Footnote 27 of the Nixon opinion. For what it is worth, I believe that it should be included. David has seen it, and he agrees. On the other hand, you of course must worry whether it would offend the Chief.

Note 27.

The Court previously has suggested that separation-of-powers concerns might make it inappropriate for a court to "infer" a Bivens cause of action against an official of the President's constitutional stature. See Carlson v. Green, supra, at 19 (in direct constitutional actions against officials with independent status in our constitutional scheme ... judicially created remedies ... might be inappropriate"); Bivens v. Six Unknown Federal Narcotics Agents, supra, at 396 (inference of a constitutional damages remedy would be inappropriate in a case involving "special factors counselling hesitation in the absence of affirmative action by Congress").

Similar concerns, discussed in test infra, counsel hesitation in concluding that Congress intended a statute of general reference to subject the President to damages liability for his official acts. We know of no instance in which Congress explicitly has undertaken to expose the President to damages liability, and we have no occasion to consider the serious constitutional issues that would arise if Congress should do so.

JUSTICE WHITE suggests that the statutes on which respondent relies should be construed as intended to create a damages action against the President. In his view the purpose of these statutes was to control Executive behavior. Post, at 21. And from this purpose he would infer that Congress must have intended to subject the President, as the principal Executive officer, to private suits for damages.

In the present posture of the case we must assume that causes of action may be inferred under 5 U.S.C. § 7211 and 18 U.S.C. § 1505. See note 20 supra. Even assuming that damages actions may be inferred against some wrongdoers, however, we do not think it follows that an intent to impose liability on the President has been established. The legislative history cited by JUSTICE WHITE, post, at 20-21, surely is not to the contrary. That history principally involves the enactment of Section 6 of the Post Office Appropriations Act of 1912, ch. 389, 37 Stat. 539. The predecessor of 5 U.S.C. § 7211, this legislation was passed by Congress partly to override "gag rules" imposed by executive orders prior to that time. In terms the statute provided that civil service employees had a right to report to

Congress and that they should not be punished for doing so. Yet there is no indication on the face of the statute that Congress intended to impose damages liability on the President. And, in the historical context, it is implausible that Congress in 1912 could have intended to create a damages remedy against the President by mere implication. Only a few years earlier, in 1896, this Court had held that the Postmaster General was absolutely immune from civil suits arising from "action having more or less connection with the general matters committed by law to his control or supervision." Spalding v. Vilas, 161 U.S. 483, 498 (1896). The rationale of Spalding, see id., at 498-499, would have applied to the President a fortiori. Accordingly, we cannot accept that "Congress ... would [have meant to] impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us." Tenney v. Brandhove, 341 U.S. 367, 376 (1 1). Nor is any indication of intent supplied by the floor debates. On the contrary, these suggest that congressional oversight--not a remedy in damages from the President--would be the principal enforcement mechanism. See 48 Cong. Rec. 4654 (1912) ("Supervisory officials will hesitate to trump up charges ... as all cases of removals will be submitted to Congress each year, and if an employee can produce satisfactory evidence that he has not received the protection afforded in this bill his case can be made the subject of a special inquiry if Congress so decides) (remarks of Rep. Calder); id., at 4656 ("Men in official position will hesitate to trump up

charges against some employee ..., as all the cames of removals and reductions will be submitted to Congress each year ....").

The other section from which respondent would infer a cause of action against the President is a criminal statute, 18 U.S.C. § 1505, originally enacted in 1940. It of course does not refer expressly to the President. And even the respondent fails to argue that the legislative history suggests any intent to create a damages remedy enforceable against the President on the basis of his official acts.

lfp/ss 05/15/82

MEMORANDUM

TO: Dick DATE: May 14, 1982

FROM: Lewis F. Powell, Jr.

79-1738 Nixon

My tentative comments - subject to discussion - on suggested changes in our opinion, are as follows:

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I would reserve for a final paragraph the answer you have given with respect to a Bivens claim.

L.F.P., Jr.,

ss

May 18, 1982

79-1738 Nixon v. Fitzgerald

Dear Chief, Bill, John and Sandra:

I send to each of you herewith, a third draft of my opinion for the Court, which you have joined.

Byron's dissent, persuasive from his viewpoint, tempted me to respond to a number of points. On reflection, however, I concluded that he had made only two substantial arguments: (i) that in resolving this case, we had to "assume" that there is an implied cause of action against a President under both Bivens and the Civil Service statutes; and (ii) that we relied too heavily on "public policy".

I therefore have confined responses to his opinion almost exclusively to these two points. I think Byron perhaps is correct that I had overemphasized "policy", when the fundamental support for absolute immunity comes from the Constitution, and the structure and history of our government. Changes in the text, marked in the margin of my third draft, have attempted to make this clear.

The "implied cause of action" point is peculiar in the present posture of the case. You may recall that there was a majority (including Byron) to decide this case on the ground that there is no implied cause of action against a President either under Bivens or the statutes. But a majority of you argued that we had taken the case to decide the immunity question, and accordingly I have written it that way. Byron, however, has relied on the statutes in a way that I think both damaging and unjustified. I think it necessary to respond, and I have done so in footnote 27, p. 16.

As indicated above, I am not replying to Byron's "parade of horribles" as to what a President may do to innocent people. I was tempted to cite from some of his own language in Stump v. Sparkman, 435 U.S. 349, 355-356, in

which he quoted from Bradley v. Fisher, 13 Wall 335, at 347. But this seems profitless. My response, therefore, is confined primarily to the foregoing points. I think Byron's criticism with respect to "public policy" was a constructive one. It has helped me, I think, to strengthen the opinion. I hope you agree.

As you have joined, I will await your views before I recirculate.

Sincerely,

The Chief Justice
Justice Rehnquist
Justice Stevens
Justice O'Connor

lfp/ss

Full Copy

Draft

Then is my version of 27 that I personally delivered to O'C on 5/20. See her rejection 5/21!

lfp/ss 05/20/82 ___ Rider A, p. 16 (Nixon)

NIXON16 SALLY-POW

27. We know of no instance in which Congress explicitly has undertaken to expose the President to damages liability. And in this case we have no occasion to consider the serious constitutional issues that would arise if Congress should do so. We are reviewing this case under the "collateral order" doctrine, the issue submitted thereunder being only the immunity of a President. The dissenting opinion appears to argue that even though Congress has not spoken expressly, an intention to create a private cause of action against all officials nevertheless may be inferred both under Bivens and the two statutes in issue. For the purpose of reviewing this case under the collateral order before us,

we may assume that causes of action may be inferred against some officials. It does not follow, however, that we must - in considering a Bivens remedy or interpreting a statute in light of the immunity doctrine - make a similar assumption with respect to the President. If, as we have concluded, a President enjoys absolute immunity from civil damage liability in the absence of explicit affirmative action by Congress, the question raised by the dissent is answered. A damages remedy may not be implied against a President for his official acts.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 19, 1982

No. 79-1738 Nixon v. Fitzgerald

Dear Lewis,

Thank you for the opportunity to review your proposed changes in the Court's opinion. It is a major opinion, and a very significant one. You have tackled it well.

I am concerned, however, about two major points. In footnote 27, the opinion seems to say that there are neither statutory nor First Amendment implied causes of action. However, if this is so, there is no need to reach the immunity issue. As you know, my first preference was to hold there is no implied cause of action. It seems to me the Court must make up its mind which issue to reach, but if we hold there is no implied cause of action, the rest is dicta.

Second, if we hold the President enjoys absolute immunity from damage suits, then we are holding in effect that Congress may not enact a statute holding the President liable for civil damages. There is no express discussion, however, of the limitation we are imposing on Congress. Inasmuch as the President is subject to subpoena duces tecum in a crimianl case, and has been held subject to injunction, there should be a clearer discussion of why Congress is restricted in this one regard, and the extent to which it is restricted.

Finally, you have opted not to expand the historical analysis. Byron made some good points in that regard and perhaps it would help the opinion to deal with it more fully.

Sincerely,

Sandra

Justice Powell

cc: The Chief Justice
Justice Rehnquist
Justice Stevens

May 20, 1982

PERSONAL

79-1738 Nixon v. Fitzgerald

Dear Chief, Bill and John:

As a result of discussions with Sandra, I expect to rewrite - and condense - footnote 27 (pp. 16-17) of my third draft sent you on May 19.

This contains changes that seemed appropriate in light of Byron's dissent. As I indicated in my letter of transmittal, note 27 was new. Sandra has made some helpful suggestions.

I suggest, therefore, that you await a change in this that I probably will make, and recirculate.

Sincerely,

The Chief Justice
Justice Rehnquist
Justice Stevens

lfp/ss

cc: Justice O'Connor

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 21, 1982

Re: No. 79-1738 - Nixon v. Fitzgerald

Dear Lewis:

I am glad you have moved away from the "policy" aspect and put the immunity holding squarely on the Constitution. This may lead me to modify my concurring opinion somewhat.

I may be in a position to deal with some of Byron's opulent rhetoric. On some of it he is just dead wrong both as to history and the Court's early utterances.

I'll get to work.

Regards,

WEB

Justice Powell

cc: Justice Rhenquist
Justice Stevens
Justice O'Connor

File

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 21, 1982

Re: No. 79-1738 Nixon v. Fitzgerald

Dear Lewis,

In view of the importance of this opinion, I have continued to work at it in light of the concerns I expressed previously. Perhaps it would be possible to condense footnote 27 even more so as to avoid some of the anomaly resulting from extending absolute immunity and also finding no implied cause of action. (1) A suggestion is attached for your consideration.

With reference to my concern about the matter of other exercises of jurisdiction over the President, I am attaching a (2) suggested substitution of Section IV B, pages 21-24. The purpose of the substitution is my concern that the present section could confuse the reader regarding the courts' exercise of jurisdiction over the President. My suggested changes attempt to make clear that we are not subtly altering our past decisions.

In addition to the changes in the text, I suggest (3) dropping footnotes 35 and 37. The citations in the first footnote are dated and may be of limited value in light of Youngstown. The references in the second footnote are not needed because of references to Youngstown in the text. Because of the (4) direct reference to United States v. Nixon in the text, I would delete the first sentence (and citation) in footnote 40. Finally, (5) I suggest integrating the substance of footnote 36 with your historical discussion in footnote 31.

I stand ready to discuss this further if it would be helpful. This "end of term" drafting is not easy.

Sincerely,

Sandra

Sandra D. O'Connor

Attachment

Dick. How much of what she now objects to is in our first draft that she joined - or did she unequivocally - & that others have joined.

27. In the present case, therefore, we are presented only with implied causes of action, and we do not address directly the immunity issue in the context of express causes of action against the President. Consequently, our holding today extends to the President absolute immunity from civil damages liability in the absence of explicit affirmative action by Congress.

pp. 21-24 -B-

Courts traditionally have recognized the President's constitutional responsibilities and status as factors counselling judicial deference and restraint. For example, while courts generally have looked to the common law to determine the scope of an official's evidentiary privilege,[n. 38] in considering such claims by the President, we have recognized that presidential immunity is "rooted in the separation of powers under the Constitution." United States v. Nixon, 418 U.S. 683, 708 (1974).

It is settled law that the separation of powers doctrine does not bar every exercise of jurisdiction over the President of the United States. See, e.g., United States v. Nixon, supra (holding that under most circumstances the President must produce materials subpoenaed for use in a criminal trial); United States v. Burr, 25 Fed. Cases 187, 191 (1807) (ordering the President to produce a letter subpoenaed for use in a criminal trial); Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952) (holding invalid a presidential order to seize property because it was not authorized by either Congress or the Constitution).[n. 39] But in deciding to exercise jurisdiction, a court must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the executive branch. See Nixon v. General Services Administration, 433 U.S. 425, 443 (1977); United States v. Nixon, 418 U.S. 683, 703-713 (1974). When judicial action is needed to serve broad public interests--as when the Court acts to maintain the proper balance of the separation of powers cf., Youngstown Sheet & Tube Co. v. Sawyer, supra, or to ensure that a criminal trial may proceed, United States v. Nixon, supra--the exercise of jurisdiction is warranted. In the case of this merely private suit for damages based on a President's official acts, we hold it is not. [n. 40]

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 21, 1982

Re: No. 79-1738 Nixon v. Fitzgerald

Dear Lewis,

In view of the importance of this opinion, I have continued to work at it in light of the concerns I expressed previously. Perhaps it would be possible to condense footnote 27 even more so as to avoid some of the anomaly resulting from extending absolute immunity and also finding no implied cause of action. A suggestion is attached for your consideration.

With reference to my concern about the matter of other exercises of jurisdiction over the President, I am attaching a suggested substitution of Section IV B, pages 21-24. The purpose of the substitution is my concern that the present section could confuse the reader regarding the courts' exercise of jurisdiction over the President. My suggested changes attempt to make clear that we are not subtly altering our past decisions.

In addition to the changes in the text, I suggest dropping footnotes 35 and 37. The citations in the first footnote are dated and may be of limited value in light of Youngstown. The references in the second footnote are not needed because of references to Youngstown in the text. Because of the direct reference to United States v. Nixon in the text, I would delete the first sentence (and citation) in footnote 40. Finally, I suggest integrating the substance of footnote 36 with your historical discussion in footnote 31.

I stand ready to discuss this further if it would be helpful. This "end of term" drafting is not easy.

Sincerely,

Sandra

Sandra D. O'Connor

Attachment

An introductory sentence has been added to make clear that we cite Mun. v. Johnson + Kendall as a matter of constitutional history.

I left 37 (Youngstown to make clear Pres. was not a party.

27. In the present case, therefore, we are presented only with implied causes of action, and we do not address directly the immunity issue in the context of express causes of action against the President. Consequently, our holding today extends to the President absolute immunity from civil damages liability in the absence of explicit affirmative action by Congress.

pp. 21-24 -B-

Courts traditionally have recognized the President's constitutional responsibilities and status as factors counselling judicial deference and restraint. For example, while courts generally have looked to the common law to determine the scope of an official's evidentiary privilege,[n. 38] in considering such claims by the President, we have recognized that presidential immunity is "rooted in the separation of powers under the Constitution." United States v. Nixon, 418 U.S. 683, 708 (1974).

It is settled law that the separation of powers doctrine does not bar every exercise of jurisdiction over the President of the United States. See, e.g., United States v. Nixon, supra (holding that under most circumstances the President must produce materials subpoenaed for use in a criminal trial); United States v. Burr, 25 Fed. Cases 187, 191 (1807) (ordering the President to produce a letter subpoenaed for use in a criminal trial); Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952) (holding invalid a presidential order to seize property because it was not authorized by either Congress or the Constitution).[n. 39] But in deciding to exercise jurisdiction, a court must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the executive branch. See Nixon v. General Services Administration, 433 U.S. 425, 443 (1977); United States v. Nixon, 418 U.S. 683, 703-713 (1974). When judicial action is needed to serve broad public interests--as when the Court acts to maintain the proper balance of the separation of powers cf., Youngstown Sheet & Tube Co. v. Sawyer, supra, or to ensure that a criminal trial may proceed, United States v. Nixon, supra--the exercise of jurisdiction is warranted. In the case of this merely private suit for damages based on a President's official acts, we hold it is not. [n. 40]

May 22, 1982

TO: MR. JUSTICE POWELL

FROM: DICK FALLON

RE: Nixon Footnote 27

Later this afternoon I'll show you draft language accommodating all of SOC's requests, as I understand them. This draft of Footnote 27 is an early installment--and more troubling than what will follow.

As I don't "like" all of the language, I call your attention to three sentences included for particular purposes. Two are very minor rewrites of Justice O'Connor's suggested language. It may help if you can tell her they are included. They are the first sentence ("In the present case ..." and the next to the last ("Consequently, our holding today ....). The last sentence, though somewhat redundant, is included for Justice Rehnquist and the Chief. It is intended to clarify that the decision <u>is</u> of a "constitutional issue" and is not a housekeeping rule of judicial policy.

May 25, 1982

79-1738 Nixon v. Fitzgerald

Dear Sandra:

I am grateful for your continued interest in this case. The enclosed draft - now ready for circulation - substantially adopts each of the three suggestions made in your letter of May 21.

On pages 21-23 I have "tracked" your draft language almost word-for-word. Footnote 31 now includes the historical discussion we both thought appropriate. In accord with the third paragraph of your letter, the substance of the former note 36 now has been "integrated" into footnote 31.

I believe we now have footnote 27 in satisfactory form. I have accepted your two suggested sentences as explanations of the opinion's approach to the questions presented. Your first sentence begins the footnote. I then have added a few sentences of my own, explaining that the approach is consistent with the Court's prior practice. Your second sentence then provides a kind of summary. The last sentence has been added to make clear that our holding fairly can be called "constitutional" - a matter of great concern to the Chief Justice.

As perhaps you sense, I am anxious to conclude work on this opinion - but only with a Court. Last Term, both Byron and I must have devoted the better part of two months to the question of presidential immunity. We ended up with a 4-4 tie, with WHR not participating. There are differences between the Kissinger case last Term and the present one as a wiretap was involved in it. But the basic question of absolute immunity was the centerpiece of our long debate. Potter, John and I worked directly together in support of the absolute immunity view, that was joined also by the Chief. At one point Thurgood agreed, but in the end

he defected. I think, as does John, that this year's opinion is an improved and stronger exposition of the absolute immunity view for the President of the United States.

I particularly appreciate your interest and support, and your suggestions have been constructive. I very much hope you will renew your join. Certainly as much as any other case this Term, it is necessary to have a solid Court for one opinion.

Although I am ready to recirculate, I want to make sure that the changes have your approval.

Sincerely,

Justice O'Connor

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 26, 1982

Re: No. 79-1738 Nixon v. Fitzgerald

Dear Lewis,

In my view, you have strengthened and improved the opinion in this important case. I gladly continue to join it. I fear I have added to your burdens with the suggestions. Thank you for all the consideration you have shown.

Sincerely,

Sandra

Justice Powell

P.S. On page 16 in footnote 27, second sentence from the end, I believe the word "immunity" may be a typographical error. Should it be "immune"?

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 27, 1982.

No. 79-1738 -- Nixon v. Fitzgerald.

Dear Byron,

Please join me.

Sincerely,

W. J. B., Jr.

Justice White.
Copies to the Conference.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 31, 1982

Re: No. 79-1738 - Nixon v. Fitzgerald

Dear Byron:

Please join me in your dissent.

I am writing a brief separate dissent. This will not hold you or Lewis up, for I suspect that you will be making some revisions in response to Lewis' third draft of May 26.

Sincerely,

Harry

Justice White

cc: The Conference

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: 31 MAY 1982

Recirculated: _____

Stylistic changes throughout;
pp. 5-6,9,14-15,19,28-29,31-33

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1738

RICHARD NIXON, PETITIONER *v.*
A. ERNEST FITZGERALD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June —, 1982]

JUSTICE WHITE, dissenting.

The four dissenting members of the Court in *Butz* v. *Economou*, 438 U. S. 478 (1978), argued that all federal officials are entitled to absolute immunity from suit for any action they take in connection with their official duties. That immunity would extend, even to actions taken with express knowledge that the conduct was clearly contrary to the controlling statute or clearly violative of the Constitution. Fortunately, the majority of the Court rejected that approach: We held that although public officials perform certain functions that entitle them to absolute immunity, the immunity attaches to particular functions—not to particular offices. Officials performing functions for which immunity is not absolute enjoy qualified immunity; they are liable in damages only if their conduct violated well-established law and if they should have realized that their conduct was illegal.

The Court now applies the dissenting view in *Butz* to the office of the President: A President acting within the outer boundaries of what Presidents normally do may, without liability, deliberately cause serious injury to any number of citizens even though he knows his conduct violates a statute or tramples on the constitutional rights of those who are injured. Even if the President in this case ordered Fitzgerald fired by means of a trumped-up reduction in force, knowing

See changes we sent to printer on 6/2

that such a discharge was contrary to the civil service laws, he would be absolutely immune from suit. By the same token, if a President, without following the statutory procedures which he knows apply to himself as well as to other federal officials, orders his subordinates to wiretap or break into a home for the purpose of installing a listening device, and the officers comply with his request, the President would be absolutely immune from suit. He would be immune regardless of the damage he inflicts, regardless of how violative of the statute and of the Constitution he knew his conduct to be, and regardless of his purpose.[1]

The Court intimates that its decision is grounded in the Constitution. If that is the case, Congress can not provide a remedy against presidential misconduct and that the criminal laws of the United States are wholly inapplicable to the President. I find this approach completely unacceptable. I do not agree that if the office of President is to operate effectively, the holder of that office must be permitted, without fear of liability and regardless of the function he is performing, deliberately to inflict injury on others by conduct that he knows violates the law.

We have not taken such a scatter-gun approach in other cases. *Butz* held that absolute immunity did not attach to the office held by a member of the President's Cabinet but only to the specific functions performed by that officer for which absolute immunity is clearly essential. Members of Congress are absolutely immune under the Speech or Debate Clause of the Constitution, but the immunity extends only to their legislative acts. We have never held that in order for legislative work to be done, it is necessary to immunize all of the tasks that legislators must perform. Constitutional immunity does not extend to those many things that Senators and Representatives regularly and necessarily do that are not legislative acts. Members of Congress, for example, re-

[1] This, of course, is not simply a hypothetical example. See *Kissinger* v. *Halperin*, *aff'd* by an equally divided Court, 452 U. S. 713 (1981).

peatedly importune the executive branch and administrative agencies outside hearing rooms and legislative halls, but they are not immune if in connection with such activity they deliberately violate the law. *United States* v. *Brewster*, 408 U. S. 501 (1972), for example, makes this clear. Neither is a Member of Congress or his aide immune from damage suits if in order to secure information deemed relevant to a legislative investigation, he breaks into a house and carries away records. *Gravel* v. *United States*, 408 U. S. 606 (1972). Judges are absolutely immune from liability for damages, but only when performing a judicial function, and even then they are subject to criminal liablity. See *Dennis* v. *Sparks*, 449 U. S. 24, 31 (1980), *O'Shea* v. *Littleton*, 414 U. S. 488, 503 (1974). The absolute immunity of prosecutors is likewise limited to the prosecutorial function. A prosecutor who directs that an investigation be carried out in a way that is patently illegal is not immune.

In *Marbury* v. *Madison*, the Court, speaking through the Chief Justice, observed that while there were "important political powers" committed to the President for the performance of which neither he nor his appointees were accountable in court, "the question, whether the legality of the act of the head of a department be examinable in a court of justice or not, must always depend on the nature of that act." 1 Cranch, 137, 165 (1803). The Court nevertheless refuses to follow this course with respect to the President. It makes no effort to distinguish categories of presidential conduct that should be absolutely immune from other categories of conduct that should not qualify for that level of immunity. The Court instead concludes that whatever the President does and however contrary to law he knows his conduct to be, he may, without fear of liability, injure federal employees or any other person within or without the government.

Attaching absolute immunity to the office of the President, rather than to particular activities that the President might perform, places the President above the law. It is a rever-

sion to the old notion that the King can do no wrong. Until now, this concept had survived in this country only in the form of sovereign immunity. That doctrine forecloses suit against the government itself and against government officials, but only when the suit against the latter actually seeks relief against the sovereign. *Larsen* v. *Domestic and Foreign Corp.*, 337 U. S. 682, 687 (1949). Suit against an officer, however, may be maintained where it seeks specific relief against him for conduct contrary to his statutory authority or to the Constitution. *Id.*, at 698. Now, however, the Court clothes the office of the President with sovereign immunity, placing it beyond the law.

In *Marbury* v. *Madison*, *supra*, at 163, the Chief Justice, speaking for the Court, observed that the "Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to observe this high appellation, if the laws furnish no remedy for the violation of a vested legal right." Until now, the Court has consistently adhered to this proposition. In *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974), a unanimous Court held that the governor of a state was entitled only to a qualified immunity. We reached this position, even though we recognized that

> "[i]n the case of higher officers of the executive branch—the inquiry is far more complex since the range of decisions and choices—whether the formulation of policy, of legislation, of budgets, or of day-to-day decisions—is virtually infinite—in short, since the options which the chief executive and his principal subordinates must consider are far broader and far more subtle than those made by officials with less responsibility, the range of discretion must be comparably broad." *Id.*, at 246, 247.

As JUSTICE BRENNAN observed in *McGautha* v. *California*, 402 U. S. 183, 252 (dissenting opinion), "The principle that our government shall be of laws and not of men is so

strongly woven into our constitutional fabric that it has found recognition in not just one but several provisions of the Constitution" (footnote omitted). And as THE CHIEF JUSTICE said in *Complete Auto Transit, Inc.* v. *Reis*, 451 U. S. 401, 429 (1981) (dissenting opinion):

> "Accountability of each individual for individual conduct lies at the core of all law—indeed, of all organized societies. The trend to eliminate or modify sovereign immunity is not an unrelated development; we have moved away from 'the king can do no wrong.' The principle of individual accountability is fundamental if the structure of an organized society is not to be eroded to anarchy and impotence, and it remains essential in civil as well as criminal justice."

Unfortunately, the Court now abandons basic principles that have been powerful guides to decision. It is particularly unfortunate since the judgment in this case has few, if any, indicia of a judicial decision; it is almost wholly a policy choice, a choice that is without substantial support and that in all events is ambiguous in its reach and import.

We have previously stated that "the law of privilege as a defense to damage actions against officers of government has 'in large part been of judicial making.'" *Butz* v. *Economou*, 438 U. S. at 501–502 (1978), quoting *Barr* v. *Matteo*, 360 U. S. 564, 569 (1959). But this does not mean that the Court has simply "enacted" its own view of the best public policy. No doubt judicial convictions about public policy—whether and what kind of immunity is necessary or wise—have played a part, but the courts have been guided and constrained by common-law tradition, the relevant statutory background and our constitutional structure and history. Our cases dealing with the immunity of members of Congress are constructions of the Speech or Debate Clause and are guided by the history of such privileges at common law. The decisions dealing with the immunity of state officers involve the ques-

tion of whether and to what extent Congress intended to abolish the common law privileges by providing a remedy in the predecessor of 42 U. S. C. § 1983 for constitutional violations by state officials. Our decisions respecting immunity for federal officials, including absolute immunity for judges, prosecutors and those officials doing similar work, also in large part reflect common law views, as well as judicial conclusions as to what privileges are necessary if particular functions are to be performed in the public interest.

Unfortunately, there is little of this approach in the Court's decision today. A footnote casually, but candidly, abandons the functional approach to immunity that has run through all of our decisions. *Ante*, at n. 34. Indeed, the majority turns this rule on its head by declaring that because the functions of the President's office are so varied and diverse and some of them so profoundly important, the office is unique and must be clothed with office-wide, absolute immunity. This is policy, not law, and in my view, very poor policy.

I

In declaring the President to be absolutely immune from suit for any deliberate and knowing violation of the Constitution or of a federal statute, the Court asserts that the immunity is "rooted in the constitutional tradition of the separation of powers and supported by our history"[1] *Ante*, at 17. The decision thus has all the earmarks of a constitutional pronouncement—absolute immunity for the President's office is mandated by the Constitution. Although the Court appears to disclaim this, *ante* at n. 27, it is difficult to read the opinion coherently as standing for any narrower proposition: Attempts to subject the President to liability either by Congress through a statutory action or by the courts through a

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[1] Although the majority opinion initially claims that its conclusion is based substantially on "our history," historical analysis in fact plays virtually no part in the analysis that follows. In a footnote, the majority refers to the "undeniable paucity of documentary sources." *Ante*, at n. 31.

Omitted in Draft 3

Bivens proceeding would violate the separation of powers.[3] Such a generalized absolute immunity cannot be sustained when examined in the traditional manner and in light of the traditional judicial sources.

The petitioner and the Solicitor General, as amicus,[4] rely principally on two arguments to support the claim of absolute immunity for the President from civil liability: absolute immunity is an "incidental power" of the Presidency, historically recognized as implicit in the Constitution, and absolute immunity is required by the separation of powers doctrine. I will address each of these contentions.

A

The Speech or Debate Clause, Art. I, § 6, guarantees absolute immunity to members of Congress; nowhere, however, does the Constitution directly address the issue of presidential immunity.[5] Petitioner nevertheless argues that the debates at the Constitutional Convention and the early history of constitutional interpretation demonstrate an implicit assumption of absolute presidential immunity. In support of this position, petitioner relies primarily on three separate items: First, preratification remarks made during the discussion of presidential impeachment at the Convention and in *The Federalist*; second, remarks made during the meeting of the first Senate; and third, the views of Justice Story.

The debate at the Convention on whether or not the President should be impeachable did touch on the potential dan-

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[3] On this point, I am in agreement with the concurring memorandum of THE CHIEF JUSTICE.

[4] The Solicitor General relies entirely upon the brief filed by his office in *Kissinger* v. *Halperin*, *supra*.

[5] In fact, insofar as the Constitution addresses the issue of Presidential liability, its approach is very different from that taken in the Speech or Debate Clause. The possibility of impeachment assures that the President can be held accountable to the other branches of Government for his actions; the Constitution further states that impeachment does not bar criminal prosecution.

gers of subjecting the President to the control of another branch, the Legislature.[4] Governor Morris, for example, complained of the potential for dependency and argued that "[the President] can do no criminal act without Coadjutors who may be punished. In case he should be re-elected, that will be sufficient proof of his innocence."[5] Col. Mason responded to this by asking if "any man [shall] be above Justice" and argued that this was least appropriate for the man "who can commit the most extensive injustice."[6] Madison agreed that "it [is] indispensable that some provision should be made for defending the Community against the incapacity, negligence or perfidy of the chief Magistrate."[7] Pinkney responded on the other side, believing that if granted the power, the Legislature would hold impeachment "as a rod over the Executive and by that means effectually destroy his independence."[8]

Petitioner concludes from this that the delegates meant impeachment to be the exclusive means of holding the President personally responsible for his misdeeds, outside of electoral politics. This conclusion, however, is hardly supported by the debate. Although some of the delegates expressed concern over limiting presidential independence, the delegates voted eight to two in favor of impeachment. Whatever the fear of subjecting the President to the power of another branch, it was not sufficient, or at least not sufficiently shared, to insulate the President from political liability in the impeachment process.

Moreover, the Convention debate did not focus on wrongs the President might commit against individuals, but rather

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[4] The debate is recorded in 2 M. Farrand, Records of the Federal Convention of 1787, 64–69 (1934).

[5] *Id.*, at 64.

[6] *Id.*, at 65.

[7] *Ibid.*

[8] *Id.*, at 66.

on whether there should be a method of holding him accountable for what might be termed wrongs against the state."[11] Thus, examples of the abuses that concerned delegates were betrayal, oppression, and bribery; the delegates feared that the alternative to an impeachment mechanism would be "tumults and insurrections" by the people in response to such abuses. The only conclusions that can be drawn from this debate are that the independence of the Executive was not understood to require a total lack of accountability to the other branches and that there was no general desire to insulate the President from the consequences of his improper acts.[12]

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[11] In Federalist No. 65, Hamilton described impeachable offenses as follows: "They are of a nature which may with peculiar propriety be denominated political, as they relate chiefly to injuries done immediately to the society itself."

[12] The majority's use of the historical record is in line with its other arguments: It puts the burden on respondent to demonstrate no presidential immunity, rather than on petititoner to prove the appropriateness of this defense. Thus, while noting that the doubts of some of the Framers were not sufficient to prevent the adoption of the Impeachment Clause, the majority nevertheless states that "nothing in [the] debates suggests an expectation that the President would be subjected to [civil damages actions]." *Ante*, at n. 31. From this the Court concludes that "the debates of the Framers accord with our conclusions," and that the "best historical evidence *supports*" its position. *Ibid.*

The short answer to the majority's speculation that litigation of this kind "may have been unthinkable in the era of the Constitutional Convention" is that such speculation ignores the documentary evidence. Not only was such litigation discussed at some of the state ratifying conventions, *infra*, but it was also discussed in the first major defense of the Constitution published in the United States. In his essays on the Constitution, published in the *Independent Gazetteer* in September 1787, Tench Coxe included the following statement in his description of the limited power of the proposed office of the President: "*His person is not so much protected as that of a member of the House of Representatives; for he may be proceeded against like any other man in the ordinary course of law.*" Quoted in II The Documentary History of the Ratification of the Constitution 141 (1976) (emphasis in original).

Much the same can be said in response to petitioner's reliance on *The Federalist* No. 77. In that essay, Hamilton asked whether the presidency combines "the requisites to safety in the republican sense—a due dependence on the people—a due responsibility." He answered that the constitutional plan met this test because it subjected the President to both the electoral process and the possibility of impeachment, including subsequent criminal prosecution. Petitioner concludes from this that these were intended to be the exclusive means of restraining presidential abuses. This, by no means follows. Hamilton was concerned in Federalist No. 77, as were the delegates at the Convention, with the larger political abuses,—"wrongs against the state"—that a President might commit. He did not consider what legal means might be available for redress of individualized grievances.

That omission should not be taken to imply exclusion in these circumstances is well illustrated by comparing some of the remarks made in the state ratifying conventions with Hamilton's discussion in No. 77. In the North Carolina ratifying convention, for example, there was a discussion of the adequacy of the impeachment mechanism for holding executive officers accountable for their misdeeds. Governor Johnson defended the constitutional plan by distinguishing three legal mechanisms of accountability:

> "If an officer commits an offence against an individual, he is amenable to the courts of law. If he commits crimes against the state, he may be indicted and punished. Impeachment only extends to high crimes and misdemeanors in a *public office*. It is a mode of trial pointed out for great misdemeanors against the public." [2]

Governor Johnson surely did not contemplate that the availability of an impeachment mechanism necessarily implied the exclusion of other forms of legal accountability; rather, the method of accountability was to be a function of the character

[2] 4 Elliot's Debates on the Federal Constitution, at 43.

of the wrong. Mr. Maclaine, another delegate to the North Carolina Convention, clearly believed that the courts would remain open to individual citizens seeking redress from injuries caused by presidential acts:

> "The President is the superior officer, who is to see the laws put in execution. He is amenable for any maladministration in his office. Were it possible to suppose that the President should give wrong instructions to his deputies, whereby the citizens would be distressed, they would have redress in the ordinary courts of common law."[14]

A similar distinction between different possible forms of presidential accountability was drawn by Mr. Wilson at the Pennsylvania ratifying convention:

> "[The President] is placed high, and is possessed of power far from being contemptible; yet not a *single privilege* is annexed to his character; far from being above the laws, he is amenable to them in his private character as a citizen, and in his public character by *impeachment*."[15]

There is no more reason to respect the views of Hamilton than those of Wilson: both were members of the constitutional convention; both were instrumental in securing the ratification of the Constitution. But more importantly, there is simply no express contradiction in their statements. Petitioner relies on an inference drawn from silence to create this contradiction. The surrounding history simply does not support this inference.

The second piece of historical evidence cited by petitioner is an exchange at the first meeting of the Senate, involving Vice-President Adams and Senators Ellsworth and MacClay. The debate started over whether or not the words "the Presi-

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[14] *Id.*, at 47.

[15] 2 Elliot 480.

dent" should be included at the beginning of Federal writs, similar to the manner in which English writs ran in the King's name. Senator MacClay thought that this would improperly combine the executive and judicial branches. This, in turn, led to a discussion of the proper relation between the two. Senator Ellsworth and Vice-President Adams defended the proposition that

> "the President, personally, was not subject to any process whatever; could have no action, whatever, brought against him; was above the power of judges, justices, &c. For [that] would put it in the power of a common justice to exercise any authority over him, and stop the whole machine of government."[16]

In their view the impeachment process was the exclusive form of process available against the President. Senator MacClay ardently opposed this view and put the case of a President committing "murder in the street." In his view, in such a case neither impeachment nor resurrection were the exclusive means of holding the President to the law; rather, there was "loyal justice." Senator MacClay, who recorded the exchange, concludes his notes with the remark that none of this "is worth minuting, but it shows clearly how amazingly fond of the old leaven many people are."[17] In his view, Senator Ellsworth and his supporters had not fully comprehended the difference in the political position of the American President and that of the British monarch. Again, nothing more can be concluded from this than that the proper scope of presidential accountability, including the question whether the President should be subject to judicial process, was no clearer then than it is now.

The final item cited by petitioner clearly supports his position, but is of such late date that it contributes little to under-

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[16] W. Maclay, Sketches of Debate in the First Senate of the United States in 1789–1791, 152 (1969).

[17] *Ibid.*

standing the original intent. In his Commentaries on the Constitution, published in 1833, Justice Story described the "incidental powers" of the President:

> "Among these must necessarily be included the power to perform [his functions] without any obstruction or impediment whatsoever. The President cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability. In the exercise of his political powers he is to use his own discretion, and he is accountable only to his country and to his own conscience. His decision in relation to these powers is subject to no control, and his discretion, when exercised, is conclusive."[17]

While Justice Story may have been firmly committed to this view in 1833, Senator Pinckney, a delegate to the Convention, was as firmly committed to the opposite view in 1800.[18]

Senator Pinckney, arguing on the floor of the Senate, contrasted the privileges extended to members of Congress by the Constitution with the lack of any such privileges extended to the President.[19] He argued that this was a delib-

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[17] 2 J. Story, Commentaries on the Constitution 372 (1873).

[18] It is not possible to determine whether this is the same Pinckney that Madison recorded as Pinkney, who objected at the Convention to granting a power of impeachment to the Legislature. Two Charles Pinckneys attended the Convention. Both were from South Carolina. See 3 M. Farrand, *supra*, at 559.

[19] Senator Pinckney's comments are recorded at 10 Annals of Congress 69–83. Petitioner contends that these remarks are not relevant because they concerned only the authority of Congress to inquire into the origin of an allegedly libelous newspaper article. Reply Brief for Petitioner, at 7. Although this was the occasion for the remarks, Pinckney did discuss the immunity of members of Congress as a privilege embodied in the Speech or Debate Clause: "our Constitution supposes no man . . . to be infallible, but considers them all as mere men, to be subject to all the passions and frail-

erate choice of the delegates to the Convention, who "well knew how oppressively the power of undefined privileges had been exercised in Great Britain, and were determined no such authority should ever be exercised here." Therefore, "[n]o privilege of this kind was intended for your Executive, nor any except that . . . for your Legislature."[21]

In previous immunity cases the Court has emphasized the

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ties, and crimes, that men generally are, and accordingly provides for the trial of such as ought to be tried, and leaves the members of the Legislature, for their proceedings, to be amenable to their constituents and to public opinion. . . ." This, then, was one of the privileges of Congress that he was contrasting with those extended (or not extended) to the President.

[21] The majority cites one additional piece of historical evidence, a letter by President Jefferson, which it contends demonstrates "that Jefferson believed the President not to be subject to judicial process."

Thomas Jefferson's views on the relation of the President to the judicial process are, however, not quite so clear as the majority suggests. Jefferson took a variety of positions on the proper relation of executive and judicial authority, at different points in his career. It would be suprising if President Jefferson had not argued strongly for such immunity from judicial process, particularly in a confrontation with Chief Justice Marshall. Jefferson's views on this issue before he became President would be of a good deal more significance. In this regard, it is significant that in Jefferson's second and third drafts of the Virginia Constitution, which also proposed a separation of the powers of government into three separate branches, he specifically proposed that the Executive be subject to judicial process: "he shall be liable to action, tho' not to personal restraint for private duties or wrongs." 1 Papers of Thomas Jefferson 350, 360. Also significant is the fact that when Jefferson's followers tried to impeach Justice Chase in 1804–1805, one of the grounds of their attack on him was that he had refused to subpoena President Adams during the trial of Dr. Cooper for sedition. See Corwin, "The President: Office and Powers" 113. Finally, it is worth noting that even in the middle of the debate over Chief Justice Marshall's power to subpoena the President during the Burr trial, Jefferson looked to a legislative solution of the confrontation: "I hope however that . . . at the ensuing session of the legislature [the Chief Justice] may have means provided for giving to individuals the benefit of the testimony of the [Executive] functionaries in proper cases." X Works of Thomas Jefferson, 407 n. (P. Ford Ed. 1905) (quoting a letter from President Jefferson to George Hay, United States District Attorney for Virginia).

Ante, at n. 31. (moved)

importance of the immunity afforded the particular government official at common law. See *Imbler* v. *Pachtman*, 424 U. S. 409, 421 (1976). Clearly this sort of analysis is not possible when dealing with an office, the presidency, that did not exist at common law. To the extent that historical inquiry is appropriate in this context, it is constitutional history, not common law, that is relevant. From the history discussed above, however, all that can be concluded is that absolute immunity from civil liability for the President finds no support in constitutional text or history, or in the explanations of the earliest commentators. This is too weak a ground to support a declaration by this Court that the President is absolutely immune from civil liability, regardless of the source of liability or the injury for which redress is sought. This much the majority implicitly concedes since history and text, traditional sources of judicial argument, merit only a footnote in the Court's opinion. *Ante*, at n. 31.

B

No bright line can be drawn between arguments for absolute immunity based on the constitutional principle of separation of powers and arguments based on what the Court refers to as "public policy." This necessarily follows from the Court's functional interpretation of the separation of powers doctrine:

> "[I]n determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions." *Nixon* v. *Administrator of General Services*, 433 U. S. 425, 443 (1977).

See also *United States* v. *Nixon*, 418 U. S. 683, 706–707

Only by virtue of brevity of its analysis can the majority plausably put forth the claim that this history provides "strong" support for a proposition that it admits to being demonstrably untrue one page later.

(1974); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 579, 635 (1952) (Jackson, J., concurring). Petitioner argues that public policy favors absolute immunity because absent such immunity the President's ability to execute his constitutionally mandated obligations will be impaired. The convergence of these two lines of argument is superficially apparent from the very fact that in both instances the approach of the Court has been characterized as a "functional" analysis.

The difference is only one of degree. While absolute immunity might maximize executive efficiency and therefore be a worthwhile policy, lack of such immunity may not so disrupt the functioning of the presidency as to violate the separation of powers doctrine. Insofar as liability in this case is of congressional origin, petitioner must demonstrate that subjecting the President to a private damages action will prevent him from "accomplishing [his] constitutionally assigned functions." Insofar as liability is based on a *Bivens* action, perhaps a lower standard of functional disruption is appropriate. Petitioner has surely not met the former burden; I do not believe that he has met the latter standard either.

Taken at face value, the Court's position that as a matter of constitutional law the President is absolutely immune should mean that he is immune not only from damages actions but also from suits for injunctive relief, criminal prosecutions and, indeed, from any kind of judicial process. But there is no contention that the President is immune from criminal prosecution in the courts under the criminal laws enacted by Congress or by the states for that matter. Nor would such a claim be credible. The Constitution itself provides that impeachment shall not bar "Indictment, Trial, Judgment, and Punishment, according to Law." Article I, Section II, Clause VII. Similarly, our cases indicate that immunity from damages actions carries no protection from criminal prosecution. *Supra*, at 3.

Neither can there be a serious claim that the separation of powers doctrine insulates presidential action from judicial re-

view or insulates the President from judicial process. No argument is made here that the President, whatever his liability for money damages, is not subject to the courts' injunctive powers. See, *e. g.*, *Youngstown Sheet & Tube Co.*, supra; *Korematsu* v. *United States*, 323 U. S. 214 (1944); *Panama Refining Co.* v. *Ryan*, 293 U. S. 38 (1935). Petitioner's attempt to draw an analogy to the Speech or Debate Clause, Brief, at 45, one purpose of which is "to prevent accountability before a possibly hostile judiciary," *Gravel* v. *United States*, 408 U. S., 606, 617 (1972), breaks down at just this point. While the Speech or Debate Clause guarantees that "for any Speech or Debate" congressmen "shall not be questioned in any other Place," and, thus, assures that congressmen, in their official capacity, shall not be the subject of the courts' injunctive powers, no such protection is afforded the Executive. Indeed, as the cases cited above indicate, it is the rule, not the exception, that executive actions—including those taken at the immediate direction of the President—are subject to judicial review.[#] Regardless of the possibility of money damages against the President, then, the constitutionality of the President's actions or their legality under the applicable statutes can and will be subject to review. Indeed, in this very case, respondent Fitzgerald's dismissal was set aside by the Civil Service Commission as contrary to the applicable regulations issued pursuant to authority granted by Congress.

Nor can private damages actions be distinguished on the ground that such claims would involve the President personally in the litigation in a way not necessitated by suits seeking declaratory or injunctive relief against certain presidential

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[#] The Solicitor General, in fact, argues that the possibility of judicial review of presidential actions supports the claim of absolute immunity: Judicial review "serves to contain and correct the unauthorized exercise of the President's power," making private damages actions unnecessary in order to achieve the same end. Brief, at 31 (see n. 3).

actions. The President has been held to be subject to judicial process at least since 1807. *Aaron Burr* case, 25 Fed. Cas. 30 (1807) (Chief Justice Marshall, sitting as circuit justice). *Burr* "squarely ruled that a subpoena may be directed to the President." *Nixon* v. *Sirica*, 487 F. 2d 700, 709 (DC Cir. 1973). Chief Justice Marshall flatly rejected any suggestion that all judicial process, in and of itself, constitutes an unwarranted interference in the Presidency:

> "The guard, furnished to this high officer, to protect him from being harassed by *vexatious* and *unnecessary* subpoenas, is to be looked for in the conduct of a court after those subpoenas have issued; not in any circumstance which is to precede their being issued." 25 Fed. Cas., at 34.

This position was recently rearticulated by the Court in *United States* v. *Nixon*, 418 U. S. 683, 706 (1974):

> "Neither the doctrine of separation of powers, nor the need for confidentiality . . . without more, can sustain an absolute, unqualified presidential privilege of immunity from judicial process under all circumstances."

These two lines of cases establish then that neither subjecting presidential actions to a judicial determination of their constitutionality, nor subjecting the President to judicial process violates the separation of powers doctrine. Similarly, neither has been held to be sufficiently intrusive to justify a judicially declared rule of immunity. With respect to intrusion by the judicial process itself on Executive functions, subjecting the President to private claims for money damages involves no more than this. If there is a separation of powers problem here, it must be found in the nature of the *remedy* and not in the *process* involved.

We said in *Butz* v. *Economou*, 438 U. S. 478 (1978), that "it is not unfair to hold liable the official who knows or should know he is acting outside the law, and . . . insisting on an

awareness of clearly established constitutional limits will not unduly interfere with the exercise of official judgment." *Id.* at 506–507. Today's decision in *Harlow* v. *Fitzgerald*, No. 80–945, makes clear that the President, were he subject to civil liability, could be held liable only for an action that he knew, or as an objective matter should have known, was illegal and a clear abuse of his authority and power. In such circumstances, the question that must be answered is who should bear the cost of the resulting injury—the wrongdoer or the victim.

The principle that should guide the Court in deciding this question was stated long ago by Chief Justice Marshall: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury* v. *Madison*, 1 Cranch 137, 163 (1803). Much more recently, the Court considered the role of a damages remedy in the performance of the courts' traditional function of enforcing federally guaranteed rights: "Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388, 395 (1971).[21] To the extent that the Court denies an otherwise appropriate remedy, it denies the victim the right to be made whole and, therefore, denies him "the protection of the laws."[22]

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[21] See also Justice Harlan's discussion of the appropriateness of the damages remedy in order to redress the violation of certain constitutional rights. *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388, 407–410 (1971) (Harlan, J. concurring).

[22] Contrary to the suggestion of the majority, *ante*, at n. 38, I do not suggest that there must always be a remedy in civil damages for every legal wrong or that *Marbury* v. *Madison* stands for this proposition. *Marbury* does, however, suggest the importance of the private interests at stake within the broader perspective of a political system based on the rule of law. The functional approach to immunity questions, which we have previously followed but which the majority today discards, represented an

That the President should have the same remedial obligations toward those whom he injures as any other federal officer is not a surprising proposition. The fairness of the remedial principle the Court has so far followed—that the wrongdoer, not the victim, should ordinarily bear the costs of the injury—has been found to be outweighed only in instances where potential liability is "thought to injure the governmental decisionmaking process." *Imbler* v. *Pachtman*, 424 U. S. 409, 437 (1976) (WHITE, J., concurring). The argument for immunity is that the possibility of a damages action will, or at least should, have an effect on the performance of official responsibilities. That effect should be to deter unconstitutional, or otherwise illegal, behavior. This may, however, lead officers to be more careful and "less vigorous" in the performance of their duties. Caution, of course, is not always a virtue and undue caution is to be avoided.

The possibility of liability may, in some circumstances, distract officials from the performance of their duties and influence the performance of those duties in ways adverse to the public interest. But when this "public policy" argument in favor of absolute immunity is cast in these broad terms, it applies to all officers, both state and federal: All officers should perform their responsibilities without regard to those personal interests threatened by the possibility of a lawsuit. See *Imbler*, *supra*, at 436 (1976) (WHITE, J., concurring).[2] Inevitably, this reduces the public policy argument to nothing more than an expression of judicial inclination as to which officers should be encouraged to perform their functions with "vigor," although with less care.[3]

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appropriate reconciliation of the conflicting interests at stake.

[2] The Court has never held that the "public policy" conclusions it reaches as to the appropriateness of absolute immunity in particular instances are not subject to reversal through congressional action. Implicity, therefore, the Court has already rejected a constitutionally-based, separation of powers argument for immunity for federal officials.

[3] Surely the fact that officers of the court have been the primary benefi-

The Court's response, until today, to this problem has been to apply the argument to individual functions, not offices, and to evaluate the effect of liability on governmental decision-making within that function, in light of the substantive ends that are to be encouraged or discouraged. In this case, therefore, the Court should examine the functions implicated by the causes of action at issue here and the effect of potential liability on the performance of those functions.

II

The functional approach to the separation of powers doctrine and the Court's more recent immunity decisions[5] converge on the following principle: The scope of immunity is determined by function, not office. The wholesale claim that the President is entitled to absolute immunity in all of his actions stands on no firmer ground than did the claim that all presidential communications are entitled to an absolute privilege, which was rejected in favor of a functional analysis, by a unanimous Court in *United States* v. *Nixon*, supra. Therefore, whatever may be true of the necessity of such a broad immunity in certain areas of executive responsibility,[6] the only question that must be answered here is whether the dismissal of employees falls within a constitutionally assigned executive function, the performance of which would be substantially impaired by the possibility of a private action for damages. I believe it does not.

Respondent has so far proceeded in this action on the basis of three separate causes of action: two federal statutes—5 U. S. C. § 7211 and 18 U. S. C. § 1505—and the First

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ciaries of this Court's pronouncements of absolute immunity gives support to this appearance of favoritism.

[5] See *Supreme Court of Virginia* v. *Consumers Union of the United States*, 446 U. S. 719 (1980); *Butz*, supra, at 511.

[6] I will not speculate on the presidential functions which may require absolute immunity, but a clear example would be instances in which the President participates in prosecutorial decisions.

Amendment. At this point in the litigation, the availability of these causes of action is not before us. Assuming the correctness of the the lower court's determination that the two federal statutes create a private right of action, I find the suggestion that the President is immune from those causes of action to be unconvincing. The attempt to found such immunity upon a separation of powers argument is particularly unconvincing.

The first of these statutes, 5 U. S. C. § 7211, states that "[t]he right of employees . . . to . . . furnish information to either House of Congress, or to a committee or a Member thereof, may not be interfered with or denied." The second, 18 U. S. C. § 1505, makes it a crime to obstruct congressional testimony. It does not take much insight to see that at least one purpose of these statutes is to assure congressional access to information in the possession of the Executive Branch, which Congress believes it requires in order to carry out its responsibilities.[20] Insofar as these statutes implicate a separation of powers argument, I would think it to be just the opposite of that suggested by petitioner and accepted by the majority. In enacting these statutes, Congress sought

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[20] See, *e. g.*, 48 Cong. Rec. 4653 (1912) ("During my first session of Congress I was desirous of learning the needs of the postal service and inquiring into the conditions of the employees. To my surprise I found that under an Executive order these civil service employees could not give me any information.") (remarks of Rep. Calder); *id.*, at 4656 ("I believe it is high time that Congress should listen to the appeals of these men and provide a way whereby they can properly present a petition to the Members of Congress for a redress of grievances without the fear of losing their official positions") (remarks of Rep. Reilly); *id.*, at 5157 ("I have always requested employees to consult with me on matters affecting their interest and believe that it is my duty to listen to all respectful appeals and complaints.") (remarks of Rep. Evans). Indeed, it is for just this reason that petitioners in No. 80-945 argue that the statutes do not create a private right of action: "5 U. S. C. § 7211 and 18 U. S. C. § 1505 were designed to protect the legislative process, not to give one such as Fitzgerald a right to seek damages." Brief for petitioners, at 26, n. 11.

to preserve its own constitutionally mandated functions in the face of a recalcitrant Executive.[3] Thus, the separation of powers problem addressed by these statutes was first of all presidential behavior that intruded upon, or burdened, Congress' performance of its own constitutional responsibilities. It is no response to this to say that such a cause of action would disrupt the President in the furtherance of his responsibilities. That approach ignores the separation of powers problem that lies behind the congressional action; it assumes that presidential functions are to be valued over congressional functions.

The argument that by providing a damages action under these statutes (as is assumed in this case) Congress has adopted an unconstitutional means of furthering its ends, must rest on the premise that presidential control of executive employment decisions is a constitutionally assigned presidential function with which Congress may not significantly interfere. This is a frivolous contention. In *United States* v. *Perkins*, 116 U. S. 483, 485 (1886), this Court held that "when Congress, by law, vests the appointment of inferior officers in the heads of Departments it may limit and restrict the power of removal as it deems best for the public interest." Whatever the rule may be with respect to high officers, see *Humphrey's Executor* v. *United States*, 295 U. S. 602 (1935), with respect to those who fill traditional bureaucratic positions, restrictions on executive authority are the rule and not the exception.[4] This case itself demonstrates, the severe statutory restraints under which the President operates in this area.

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[3] Indeed, the impetus for passage of what is now 5 U. S. C. § 7211 was the imposition of "gag rules" upon testimony of civil servants before congressional committees. See Exec. Order No. 402 (Jan. 25, 1906); Exec. Order No. 1142 (Nov. 26, 1909).

[4] Thus, adverse action may generally be taken against civil servants only "for such cause as will promote the efficiency of the service." 5 U. S. C. §§ 7503, 7513 and 7543.

Fitzgerald was a civil service employee working in the Office of the Secretary of the Air Force. Although his position was such as to fall within the "excepted" service, which would ordinarily mean that Civil Service rules and regulations applicable to removals would not protect him, 5 CFR Part 6, §6.4, his status as a veteran entitled him to special protections. Veterans are entitled to certain Civil Service benefits afforded to "preference eligibles." 5 U. S. C. §2108. These benefits include that set forth in 5 U. S. C. §7513(a): "An agency may take [adverse action] against an employee only for such cause as will promote the efficiency of the service." Similarly, his veteran status entitled Fitzgerald to the protection of the reduction in force procedures established by civil service regulation. 5 U. S. C. §§3501–3502. It was precisely those procedures that the Chief Examiner for the Civil Service Commission found had been violated, in his 1973 recommendation that respondent be reappointed to his old position or to a job of comparable authority.

This brief review is enough to illustrate my point: Personnel decisions of the sort involved in this case are emphatically not a constitutionally assigned presidential function that will tolerate no interference by either of the other two branches of government. More important than this "quantitative" analysis of the degree of intrusion in presidential decisionmaking permitted in this area, however, is the "qualitative" anaylsis suggested in §I(B) above.

Absolute immunity is appropriate when the threat of liability may bias the decisionmaker in ways that are adverse to the public interest. But as the various regulations and statutes protecting civil servants from arbitrary executive action illustrate, this is an area in which the public interest is demonstrably on the side of encouraging less "vigor" and more "caution" on the part of decisionmakers. That is, the very steps that Congress has taken to assure that executive employees will be able freely to testify in Congress and to assure

that they will not be subject to arbitrary adverse actions indicate that those policy arguments that have elsewhere justified absolute immunity are not applicable here. Absolute immunity would be nothing more than a judicial declaration of policy that directly contradicts the policy of protecting civil servants reflected in the statutes and regulations.

If respondent could, in fact, have proceeded on his two statutory claims, the *Bivens* action would be superfluous. Respondent may not collect damages twice, and the same injuries are put forward by respondent as the basis for both the statutory and constitutional claims. As we have said before, "were Congress to create equally effective alternative remedies, the need for damages relief [directly under the Constitution] might be obviated." *Davis* v. *Passman*, 442 U. S. 228, 248 (1979). Nevertheless, because the majority decides that the President is absolutely immune from a *Bivens* action as well, I shall express by disagreement with that conclusion.

In *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388 (1971), we held that individuals who have suffered a compensable injury through a violation of the rights guaranteed them by the Fourth Amendment may invoke the general federal-question jurisdiction of the federal courts in a suit for damages. That conclusion rested on two principles: First, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws," 403 U. S., at 397, quoting *Marbury* v. *Madison*, 1 Cranch 137, 163 (1803); second, "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." 403 U. S., at 395. In *Butz* v. *Economou*, 438 U. S. 478 (1977), we rejected the argument of the federal government that federal officers, including cabinet officers, are absolutely immune from civil liability for such constitutional violations—a position that we recognized would substantially undercut our conclusion in *Bivens*. We held there that although the performance of certain limited functions will be protected by the shield of absolute immu-

nity, the general rule is that federal officers, like state officers, have only a qualified immunity. Finally, in *Davis* v. *Passman*, 442 U. S. 228 (1979), we held that a Congressman could be held liable for damages in a *Bivens*-type suit brought in federal court alleging a violation of individual rights guaranteed the plaintiff by the Due Process Clause. In my view, these cases have largely settled the issues raised by the *Bivens* apsect of this case.

These cases established the following principles. First, it is not the exclusive prerogative of the legislative branch to create a federal cause of action for a constitutional violation. In the absence of adequate legislatively prescribed remedies, the general federal-question jurisdiction of the federal courts permits the courts to create remedies, both legal and equitable, appropriate to the character of the injury. Second, exercise of this "judicial" function does not create a separation of powers problem: We have held both executive and legislative officers subject to this judicially created cause of action and in each instance we have rejected separation of powers arguments. Holding federal officers liable for damages for constitutional injuries no more violates separation of powers principles than do the equitable remedies that result from the traditional function of judicial review. Third, federal officials will generally have a "qualified immunity" from such suits; absolute immunity will be extended to certain functions only on the basis of a showing that exposure to liability is inconsistent with the proper performance of the official's duties and responsibilities. Finally, Congress retains the power to restrict exposure to liability, and the policy judgments implicit in this decision should properly be made by Congress.

The majority fails to recognize the force of what the Court has already done in this area. Under the above principles, the President could not claim that there are no circumstances under which he would be subject to a *Bivens*-type action for violating respondent's constitutional rights. Rather, he must assert that the absence of absolute immunity will substantially impair his ability to carry out particular functions

that are his constitutional responsibility. For the reasons I have presented above, I do not believe that this argument can be successfully made under the circumstances of this case.

It is, of course, theoretically possible, that the President should be held to be absolutely immune because each of the functions for which he has constitutional responsibility would be substantially impaired by the possibility of civil liability. I do not think this argument is valid for the simple reason that the function involved here does not have this character. Which side of the line other presidential functions would fall on need not be decided in this case.

The majority opinion suggests a variant of this argument. It argues, not that every presidential function has this character, but that distinguishing the particular functions involved in any given case would be "difficult." *Ante*, at n. 34.[32] Even if this were true, it would not necessarily follow that the President is entitled to absolute immunity: That would still depend on whether, in those unclear instances, it is likely to be the case that one of the functions implicated deserves the protection of absolute immunity. In this particular case, I see no such function.[33]

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[32] The majority also seems to believe that by "function" the Court has in the past referred to "subjective purpose." See *ante*, at n. 34 ("judges frequently would need to inquire into the *purpose* for which acts were taken."). I do not read our cases that way. In *Stump* v. *Sparkman*, 435 U. S. 349, 362 (1978), we held that the factors determining whether a judge's act was a "judicial action" entitled to absolute immunity "relate to the nature of the act itself, *i. e.* whether it is a function normally performed by a judge, and to the expectations of the parties." Neither of these factors required any analysis of the purpose the judge may have had in carrying out the particular action. Similarly in *Butz* v. *Economou*, 438 U. S. 478, 512–516 (1977), when we determined that certain executive functions were entitled to absolute immunity because they shared "enough of the characteristics of the judicial process," we looked to objective qualities and not subjective purpose.

[33] The majority seems to suggest that responsibility for governmental reorganizations is one such function. *Ante*, at n. 34. I fail to see why this

I do not believe that subjecting the President to a *Bivens* action would create separation of powers problems or "public policy" problems different from those involved in subjecting the President to a statutory cause of action.[34] Relying upon the history and text of the Constitution, as well as the analytic method of our prior cases, I conclude that these problems are not sufficient to justify absolute immunity for the President in general, nor under the circumstances of this case in particular.

III

Because of the importance of this case, it is appropriate to examine the reasoning of the majority opinion.

The opinion suffers from serious ambiguity even with respect to the most fundamental point: How broad is the immunity granted the President? The opinion suggests that its scope is limited by the fact that under none of the asserted causes of action "has Congress taken express legislative action to subject the President to civil liability for his official acts." *Ante*, at 16. We are never told, however, how or why Congressional action could make a difference. It is not apparent that any of the propositions relied upon by the majority to immunize the President would not apply equally to such a statutory cause of action; nor does the majority indicate what new principles would operate to undercut those propositions.

In the end, the majority seems to overcome its initial hesitation, for it announces that, "[w]e consider [absolute] immunity a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history," *ibid.*

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should be so.

[34] Although our conclusions differ, the majority opinion reflects a similar view as to the relationship between the two sources of the causes of action in this case: It does not believe it necessary to differentiate in its own analysis between the statutory and constitutional causes of action.

See also *id.*, at 24 ("A rule of absolute immunity for the President will not leave the Nation without sufficient remedies for misconduct on the part of the chief executive.").[35] While the majority opinion recognizes that "[i]t is settled law that the separation of powers doctrine does not bar every exercise of jurisdiction over the President of the United States," it bases its conclusion, at least in part, on a suggestion that there is a special jurisprudence of the presidency. *Ante*, at 22–23.[36]

But in *United States* v. *Nixon*, 418 U. S. 683 (1974), we upheld the power of a federal district court to issue a subpoena *duces tecum* against the President. In other cases we have enjoined executive officials from carrying out presidential

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[35] THE CHIEF JUSTICE leaves no doubt that he, at least, reads the majority opinion as standing for the broad proposition that the President is absolutely immune under the Constitution:

"I write separately to emphasize that the presidential immunity spelled out today derives from and is mandated by the Constitution. Absolute immunity for a President is either implicit in the constitutional doctrine of separation of powers or it does not exist." Memorandum of Concurrence, at 1.

[36] Contrary to the suggestion of the majority, *Mississippi* v. *Johnson*, 71 U. S. 475 (1866), carefully reserved the question of whether a court may compel the President himself to perform ministerial executive functions:

"We shall limit our inquiry to the question presented by the objection, without expressing any opinion on the broader isseus . . . whether, in any case, the President, . . . may be required, by the process of this court, to perform a purely ministerial act under a positive law, or may be held amenable, in any case, otherwise than by impeachment for crime."

Similarly, *Kendall* v. *United States*, 12 Pet. 524 (1838), also cited by the majority, did not indicate that the President could never be subject to judicial process. In fact, it implied just the contrary in rejecting the argument that the mandamus sought involved an unconstitutional judicial infringement upon the Executive Branch:

"The mandamus does not seek to direct or control the postmaster general in the discharage of any official duty, partaking in any respect of an executive character; but to enforce the performance of a mere ministerial act, which neither he nor the president had any authority to deny or control." *Id.*, at 610.

directives. See *e. g., Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952). Not until this case has there ever been a suggestion that the mere formalism of the name appearing on the complaint was more important in resolving separation of powers problems than the substantive character of the judicial intrusion upon executive functions.

The majority suggests that the separation of powers doctrine permits exercising jurisdiction over the President only in those instances where "judicial action is needed to serve broad public interests—as when the Court acts, not in derogation of the separation of powers, but to maintain their proper balance." *Ante*, at 23. Without explanation, the majority contends that a "merely private suit for damages" does not serve this function.

The suggestion that enforcement of the rule of law—*i. e.*, subjecting the President to rules of general applicability—does not further the separation of powers, but rather is in derogation of this purpose, is bizarre. At stake in a suit of this sort, to the extent that it is based upon a statutorily created cause of action, is the ability of Congress to assert legal restraints upon the Executive and of the courts to perform their function of providing redress for legal harm. Regardless of what the Court might think of the merits of Mr. Fitzgerald's claim, the idea that pursuit of legal redress offends the doctrine of separation of powers is a frivolous contention passing as legal argument.

Similarly, the majority implies that the assertion of a constitutional cause of action—the whole point of which is to assure that an officer does not transgress the constutitional limits on his authority—may offend separation of powers concerns. This is surely a perverse approach to the Constitution: Whatever the arguments in favor of absolute immunity may be, it is untenable to argue that subjecting the President to constitutional restrictions will undercut his "unique" role in our system of government. It cannot be seriously argued that the President must be placed beyond the law and

beyond judicial enforcement of constitutional restraints upon executive officers in order to implement the principle of separation of powers.

Focusing on the actual arguments the majority offers for its holding of absolute immunity for the President, one finds suprisingly little. As I read the relevant section of the Court's opinion, I find just three contentions from which the majority draws this conclusion. Each of them is little more than a makeweight; together they hardly suffice to justify the wholesale disregard of our traditional approach to immunity questions.

First, the majority informs us that the President occupies a "unique position in the constitutional scheme," including responsibilities for the administration of justice, foreign affairs, and management of the Executive Branch. *Ante*, at 17–18. True as this may be, it says nothing about why a "unique" rule of immunity should apply to the President. The President's unique role may indeed encompass functions for which he is entitled to a claim of absolute immunity. It does not follow from that, however, that he is entitled to absolute immunity either in general or in this case in particular.

For some reason, the majority believes that this uniqueness of the President shifts the burden to respondent to prove that a rule of absolute immunity does not apply. The respondent has failed in this effort, the Court suggests, because the President's uniqueness makes "inapposite" any analogy to our cases dealing with other executive officers. *Ante*, at 18. Even if this were true, it would not follow that the President is entitled to absolute immunity; it would only mean that a particular argument is out of place. But the fact is that it is not true. There is nothing in the President's unique role that makes the arguments used in those other cases inappropriate.

Second, the majority contends that because the President's "visibility" makes him particularly vulnerable to suits for civil damages, *ante*, at 20, a rule of absolute immunity is required.

The force of this argument is surely undercut by the majority's admission that "there is no historical record of numerous suits against the President." *Id*, at n. 33. Even granting that a *Bivens* cause of action did not becomes available until 1971, in the eleven years since then there have been only a handful of suits. Many of these are frivolous and dealt with in a routine manner by the courts and the Justice Department. There is no reason to think that, in the future, the protection afforded by summary judgment procedures would not be adequate to protect the President, as they currently protect other executive officers from unfounded litigation. Indeed, given the decision today in *Harlow & Butterfield* v. *Fitzgerald*, No. 80–945, there is even more reason to believe that frivolous claims will not intrude upon the President's time. Even if judicial procedures were found not to be sufficient, Congress remains free to address this problem if and when it develops.

Finally, the Court suggests that potential liability "frequently could distract a President from his public duties." *Ante*, at 20. Unless one assumes that the President himself makes the countless high level executive decisions required in the administration of government, this rule will not do much to insulate such decisions from the threat of liability. The logic of the proposition cannot be limited to the President; its extension, however, has been uniformly rejected by this Court. See *Butz*, *supra*; *Harlow & Butterfield*, *supra*. Furthermore, in no instance have we previously held legal accountability in itself to be an unjustifiable cost. The availability of the courts to vindicate constitutional and statutory wrongs has been perceived and protected as one of the virtues of our system of delegated and limited powers. As I argued in § I, our concern in fashioning absolute immunity rules has been that liability may pervert the decisionmaking process in a particular function by undercutting the values we expect to guide those decisions. Except for the empty generality that the President should have "'the maximum ability to

deal fearlessly and impartially with' the duties of his office," *ante* at 20, the majority nowhere suggests a particular, disadvantageous effect on a specific presidential function. The caution that comes from requiring reasonable choices in areas that may intrude on individuals' legally protected rights has never before been counted as a cost.

IV

The majority may be correct in its conclusion that "a rule of absolute immunity will not leave the Nation without sufficient remedies for misconduct on the part of the chief executive." *Ante*, at 24. Such a rule will, however, leave Mr. Fitzgerald without an adequate remedy for the harms that he may have suffered. More importantly, it will leave future plaintiffs without a remedy, regardless of the substantiality of their claims. The remedies in which the Court finds comfort were never designed to afford relief for individual harms. Rather, they were designed as political safety-valves. Politics and history, however, are not the domain of the courts; the courts exist to assure each individual that he, as an individual, has enforcable rights that he may pursue to achieve a peaceful redress of his legitimate grievances.

I find it ironic, as well as tragic, that the Court would so casually discard its own role of assuring "the right of every individual to claim the protection of the laws," *Marbury* v. *Madison*, 1 Cranch 137, 163 (1803), in the name of protecting the principle of separation of powers. Accordingly, I dissent.

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Powell

Circulated: MAR 17 1982

Recirculated: _____

FIRST CIRCULATED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1738

RICHARD NIXON, PETITIONER, *v.*
A. ERNEST FITZGERALD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[March ——, 1982]

JUSTICE POWELL delivered the opinion of the Court.

The plaintiff in this lawsuit seeks relief in civil damages from a former President of the United States. The claim rests on actions allegedly taken during the former President's tenure in office. The issue before us is the scope of the immunity possessed by the President of the United States.

I

In January 1970 the respondent A. Ernest Fitzgerald lost his job as a management analyst with the Department of the Air Force. Fitzgerald's dismissal occurred in the context of a departmental reorganization and reduction in force, in which his job was eliminated. In announcing the reorganization, the Air Force characterized the action as taken to promote economy and efficiency in the armed forces.

Respondent's discharge attracted unusual attention in Congress and in the press. Fitzgerald had attained national prominence approximately one year earlier, during the waning months of the presidency of Lyndon B. Johnson. On November 13, 1968, Fitzgerald appeared before the Subcommittee on Economy in Government of the Joint Economic Committee of the United States Congress. To the apparent embarrassment of his superiors in the Department of Defense, Fitzgerald testified that cost-overruns on the C-5A

transport plane could approximate $2 billion.[1] He also revealed that unexpected technical difficulties had arisen during the development of the aircraft.

Concerned that Fitzgerald might have suffered retaliation for his congressional testimony, the Subcommittee on Economy in Government convened public hearings on Fitzgerald's dismissal.[2] The press reported those hearings prominently, as it had the earlier announcement that his job was being eliminated by the Department of Defense. At a news conference on December 8, 1969, President Richard Nixon was queried about Fitzgerald's impending separation from government service.[3] The President responded by promising to

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[1] See *Economics of Military Procurement: Hearings Before the Subcommittee on Economy in Government of the Joint Economic Comm.*, 90th Cong., 2d Sess., Part I, at 199–201 (1968–1969). It is not disputed that officials in the Department of Defense were both embarrassed and angered by Fitzgerald's testimony. Within less than two months of respondent's congressional appearance, staff had prepared a memorandum for the outgoing Secretary of the Air Force, Harold Brown, listing three ways in which Fitzgerald might be removed from his position. See App. 209–211 (Memorandum of John Lang to Harold Brown, Jan. 6, 1969). Among these was a "reduction in force"—the means by which Fitzgerald ultimately was removed by Brown's successor in office under the new Nixon administration. The reduction in force was announced publicly on November 4, 1969, and Fitzgerald accordingly was separated from the Air Force upon the elimination of his job on January 5, 1970.

[2] See *The Dismissal of A. Ernest Fitzgerald by the Department of Defense: Hearings Before the Subcomm. on Economy in Government of the Joint Economic Comm.*, 91st Cong., 1st Sess. (1969). Some 60 Members of Congress also signed a letter to the President protesting the "firing of this dedicated public servant" as a "punitive action." *Id.*, at 115–116, App., at 177–179.

[3] A briefing memorandum on the Fitzgerald matter had been prepared by White House staff in anticipation of a possible inquiry at the forthcoming press conference. Authored by aide Patrick Buchanan, it advanced the view that the Air Force was "firing . . . a good public servant." App. 269 (Memorandum of Patrick Buchanan to Richard Nixon, December 5, 1969). The memorandum suggested that the President order Fitzgerald's retention by the Defense Department.

look into the matter.[4] Shortly after the news conference the petitioner asked White House Chief of Staff H.R. Haldeman to arrange for Fitzgerald's assignment to another job within the Administration.[5] It also appears that the President suggested to Budget Director Robert Mayo that Fitzgerald might be offered a position in the Bureau of the Budget.[6]

Fitzgerald's proposed reassignment encountered resistance within the Administration.[7] In an internal memorandum of January 20, 1970, White House aide Alexander Butterfield reported to Haldeman that "Fitzgerald is no doubt a top-notch cost expert, but he must be given very low marks in loyalty; and after all, loyalty is the name of the game."[8] Butterfield therefore recommended that "We should let him bleed, for a while at least."[9] There is no evi-

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[4] App. 228.

[5] See App. 109–112 (Deposition of H.R. Haldeman); App. 137–141 (Deposition of petitioner Richard Nixon). Haldeman's deposed testimony was based on his handwritten notes of December 12, 1969. App. 275.

[6] See App. 126 (Deposition of Robert Mayo); App. 141 (Deposition of Richard Nixon).

[7] Both Mayo and his deputy, James Schlesinger, appear to have resisted at least partly due to a suspicion that Fitzgerald lacked institutional loyalty to Executive policies and that he spoke too freely in communications with friends on Capitol Hill. Both also stated that high level positions were presently unavailable within the Bureau of the Budget. See App. 126 (Deposition of Robert Mayo); App. 146–147 (Deposition of James Schlesinger).

[8] Quoted in *Decision on the Appeal of A. Ernest Fitzgerald* (*CSC Decision*), App., at 60, 84 (September 18, 1973).

[9] *Id.*, at 85. The memorandum added that "We owe 'first choice on Fitzgerald' to [Senator] Proxmire and others who tried so hard to make him a hero [for exposing the cost overruns]." Suspicion of Fitzgerald's assumed loyalty toward Senator Proxmire was widely shared in the White House and in the Defense Department. According to the *CSC Decision*, *supra*, App., at 88:

"While Mr. Fitzgerald has denied that he was 'Senator Proxmire's boy in the Air Force,' and he may honestly believe it, we find this statement difficult to accept. It is evident that the top officials in the Air Force, without specifically saying so, considered him to be just that. . . . We also note

dence of White House efforts to reemploy Fitzgerald subsequent to the Butterfield memorandum.

Absent any offer of alternative federal employment, Fitzgerald complained to the Civil Service Commission. In a letter of January 20, 1970, he alleged that his separation represented unlawful retaliation for his truthful testimony before a congressional committee.[10] The Commission convened a closed hearing on Fitzgerald's allegations on May 4, 1971. Fitzgerald, however, preferred to present his grievances in public. After he had brought suit and won an injunction, *Fitzgerald* v. *Hampton*, 467 F. 2d 755 (CADC 1972), public hearings commenced on January 26, 1973. The hearings again generated publicity, much of it devoted to the testimony of Air Force Secretary Robert Seamans. Although he denied that Fitzgerald had lost his position in retaliation for congressional testimony, Seamans testified that he had received "some advice" from the White House before Fitzgerald's job was abolished.[11] But the Secretary declined to be more specific. He responded to several questions by invoking "executive privilege."[12]

At a news conference on January 31, 1973, the President was asked about Mr. Seamans' testimony. Mr. Nixon took the opportunity to assume personal responsibility for Fitzgerald's dismissal:

> "I was totally aware that Mr. Fitzgerald would be fired or discharged or asked to resign. I approved it and Mr. Seamans must have been talking to someone who had discussed the matter with me. No, this was not a case of some person down the line deciding he

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that upon leaving the Air Force Mr. Fitzgerald was employed as a consultant by the Proxmire Committee and that Senator Proxmire appeared at the Commission hearing as a character witness for [Fitzgerald]."

[10] See *CSC Decision*, App., at 61.

[11] See *id.*, at 83–84.

[12] See *ibid.*

> should go. It was a decision that was submitted to me. I made it and I stick by it."[13]

A day later, however, the White House press office issued a retraction of the President's statement. According to a press spokesman, the President had confused Fitzgerald with another former executive employee. On behalf of the President, the spokesman asserted that Mr. Nixon had not had "put before him the decision regarding Mr. Fitzgerald."[14]

After hearing over 4,000 pages of testimony, the Chief Examiner for the Civil Service Commission issued his decision in the Fitzgerald case on September 18, 1973. *Decision on the Appeal of A. Ernest Fitzgerald*, App., at 60. The Examiner held that Fitzgerald's dismissal had offended applicable civil service regulations. App. 86–87.[15] The Examiner based this conclusion on a finding that the departmental reorganization in which Fitzgerald lost his job, though purportedly implemented as an economy measure, was in fact moti-

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[13] App. 185. A few hours after the press conference, Mr. Nixon repeated privately to Presidential aide Charles Colson that he had ordered Fitzgerald's firing. App. 214–215 (recorded conversation of Jan. 31, 1973).

[14] App. 196 (transcription of statement of White House press secretary Ronald Ziegler, Feb. 1, 1973). In a conversation with aide John Ehrlichman, following his conversation with Charles Colson, see *supra* note 18, the President again had claimed responsibility for Fitzgerald's dismissal. When Ehrlichman corrected him on several details, however, the President concluded that he was "thinkin' of another case." App. 218 (recorded conversation of Jan. 31, 1973). See *id.*, at 220. It was after this conversation that the retraction was ordered.

[15] Fitzgerald's position in the Air Force was in the "excepted service" and therefore not covered by civil service rules and regulations for the competitive service. *Fitzgerald* v. *Hampton*, 467 F. 2d 755, 758 (CADC 1972); see *CSC Decision*, App., at 63–64. In *Hampton*, however, the court held that Fitzgerald's employment nonetheless was under "legislative protection," since he was a "preference eligible" veteran entitled to various statutory protections under the Veterans Preference Act. See 467 F. 2d, at 758–768. Among these were the benefits of the reduction in force procedures established by civil service regulation. See 467 F. 2d, at 758.

vated by "reasons purely personal to" respondent. *Id.*, at 86. As this was an impermissible basis for a reduction in force,[16] the Examiner recommended Fitzgerald's reappointment to his old position or to a job of comparable authority.[17] The Examiner, however, explicitly distinguished this narrow conclusion from a suggested finding that Fitzgerald had suffered retaliation for his testimony to Congress. As found by the Commission, "the evidence in the record does not support [Fitzgerald's] allegation that his position was abolished and that he was separated . . . in retaliation for his having revealed the C–5A cost overrun in testimony before the Proxmire Committee on November 13, 1968." *Id.*, at 81.

Following the Commission's decision, Fitzgerald filed a suit for damages in the United States District Court. In it he raised essentially the same claims presented to the Civil Service Commission.[18] As defendants he named eight officials of the Defense Department, White House aide Alex-

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[16] The Examiner found that Fitzgerald in fact was dismissed because of his superiors' dissatisfaction with his job performance. *CSC Decision*, App., at 86–87. Their attitude was evidenced by "statements that he was not a 'team player' and 'not on the Air Force team.'" App. 83. Without deciding whether this would have been an adequate basis for an "adverse action" against Fitzgerald as an "inadequate or unsatisfactory employee," *id.*, at 86, the Examiner held that the Commission's adverse action procedures, current version codified at 5 CFR § 752, implicitly forbade the Air Force to employ a "reduction in force" as a means of dismissing respondent for reasons "personal to" him. App. 87.

[17] The Commission also ordered that Fitzgerald should receive back pay. *CSC Decision*, App., at 87–88. Despite the Commission's order, respondent avers that he "has still not obtained reinstatement to a position equivalent to his former one," Brief for Respondent, at 11, n. 17, and that he therefore has brought an enforcement action in the District Court.

[18] The complaint alleged a continuing conspiracy to deprive him of his job, to deny him reemployment, and to besmirch his reputation. Fitzgerald alleged that the conspiracy had continued through the Commission hearings and remained in existence at the initiation of the lawsuit. See *Fitzgerald* v. *Seamans*, 384 F. Supp. 688, 690–692 (DC 1974).

ander Butterfield, and "one or More" unnamed "White House Aides" styled only as "John Does."

The District Court dismissed the action under the District of Columbia's three-year statute of limitations, *Fitzgerald* v. *Seamans*, 384 F. Supp. 688 (D.D.C. 1974), and the Court of Appeals affirmed as to all but one defendant, White House aide Alexander Butterfield, *Fitzgerald* v. *Seamans*, 553 F. 2d 220 (CADC 1977). The Court of Appeals reasoned that Fitzgerald had no reason to suspect White House involvement in his dimissal at least until 1973. In that year, reasonable grounds for suspicion had arisen, most notably through publication of the internal White House memorandum in which Butterfield had recommended that Fitzgerald at least should be made to "bleed for a while" before being offered another job in the Administration. *Id.*, at 225, 229. Holding that concealment of illegal activity would toll the statute of limitations, the Court of Appeals remanded the action against Butterfield for further proceedings in the District Court.

Following the remand and extensive discovery thereafter, Fitzgerald filed a Second Amended Complaint in the District Court on July 5, 1978. It was in this amended complaint—more than eight years after he had complained of his discharge to the Civil Service Commission—that Fitzgerald first named the petitioner Nixon as a party defendant.[19] Also included as defendants were White House aide Bryce Harlow and other officials of the Nixon administration. Additional discovery ensued. By March 1980, only three defendants remained: the petitioner Richard Nixon and White House aides

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[19]The general allegations of the complaint remained essentially unchanged. In averring Nixon's participation in the alleged conspiracy against him, the complaint quoted petitioner's press conference statement that he was "totally aware" of and in fact "approved" Fitzgerald's dismissal. Second Amended Complaint, at 6.

Harlow and Butterfield. Denying a motion for summary judgment, the District Court ruled that the action must proceed to trial. Its order of March 26 held that Fitzgerald had stated triable causes of action under two federal statutes and the First Amendment to the Constitution.[2] The Court also ruled that petitioner was not entitled to claim absolute presidential immunity.

Petitioner took a collateral appeal of the immunity decision to the Court of Appeals for the District of Columbia Circuit. The Court of Appeals dismissed summarily. It apparently did so on the ground that its recent decision in *Halperin* v. *Kissinger*, 606 F. 2d 1192 (CADC 1979), aff'd by an equally

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[2] See Appendix to Petition for Certiorari, at 1a–2a. The District Court held that respondent was entitled to "infer" a cause of action under 5 U. S. C. § 7211 and 18 U. S. C. § 1505. Neither expressly confers a private right to sue for relief in damages. The first, 5 U. S. C. § 7211 (Supp. III 1979), provides generally that "The right of employees . . . to . . . furnish information to either House of Congress, or to a committee or a Member thereof, may not be interfered with or denied." The second, 18 U. S. C. § 1505, is a criminal statute making it a crime to obstruct congressional testimony. The correctness of the decision that a cause of action could be "implied" under these statutes is not currently before us. Neither is the question whether the courts, under the direct authority of the First Amendment, may recognize a private action against the President for relief in damages. Cf. *Carlson* v. *Green*, 446 U. S. 14, 19 (1980) (in direct constitutional actions against officials with "independent status in our constitutional scheme . . . judicially created remedies . . . might be inappropriate"); *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388, 396 (1971) (upholding judicial recognition of a nonstatutory damages remedy for Fourth Amendment violations in cases "involv[ing] no special factors counselling hesitation in the absence of affirmative action by Congress"). As explained *infra*, this case is here under the "collateral order" doctrine, for review of the District Court's denial of petitioner's motion to dismiss on the ground that he enjoyed absolute immunity from civil suit. The District Court also held that respondent had stated a claim under the common law of the District of Columbia, but respondent subsequently abandoned his common law cause of action. See Respondent's Supplemental Brief, at 2 (May 14, 1980).

divided vote, 452 U. S. 713 (1981), had rejected this claimed immunity defense.

As this Court has not ruled on the scope of immunity available to a President of the United States, we granted certiorari to decide this important issue. 452 U. S. 957 (1981).

II

Before addressing the merits of this case, we must consider two challenges to our jurisdiction. In his opposition to the petition for certiorari, respondent argued that this Court is without jurisdiction to review the non-final order in which the District Court rejected petitioner's claim to absolute immunity.[21] We also must consider an argument that an agreement between the parties has mooted the controversy.

A

Petitioner invokes the jurisdiction of this Court under 28 U. S. C. § 1254, a statute that invests us with authority to review "[c]ases in" the courts of appeals.[22] When the petitioner in this case sought review of an interlocutory order denying his claim to absolute immunity, the Court of Appeals dismissed the appeal for lack of jurisdiction. Emphasizing the "jurisdictional" basis for the Court of Appeals' decision, respondent argued that the District Court's order was not an appealable "case" properly "in" the Court of Appeals within the meaning of § 1254. We do not agree.

Under the "collateral order" doctrine of *Cohen* v. *Benefi-*

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[21] See Brief for Respondent in Opposition to the Petition for Certiorari, at 2. Although Fitzgerald has not continued to urge this argument, the challenge was jurisdictional, and we therefore address it.

[22] The statute provides in pertinent part:

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. . . .

28 U. S. C. § 1254.

cial Industrial Loan Corp., 337 U. S. 541 (1949), a small class of interlocutory orders are immediately appealable to the courts of appeals. As defined by *Cohen*, this class embraces orders that "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and [are] effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 468 (1978); see *Cohen*, *supra*, 337 U. S., at 546–547. As an additional requirement, *Cohen* established that a collateral appeal of an interlocutory order must "present[] a serious and unsettled question." 337 U. S., at 547. At least twice before this Court has held that orders denying claims of absolute immunity are appealable under the *Cohen* criteria. See *Helstoski* v. *Meanor*, 442 U. S. 500 (1979) (claim of immunity under the Speech and Debate Clause); *Abney* v. *United States*, 431 U. S. 651 (1977) (claim of immunity under Double Jeopardy Clause). In previous cases the Court of Appeals for the District of Columbia Circuit also has treated orders denying absolute immunity as appealable under *Cohen*. See *Briggs* v. *Goodwin*, 569 F. 2d 10, 58–60 (CADC 1977) (Wilkey, J., writing separately for the Court on the appealability issue); *McSurely* v. *McClellan*, 521 F. 2d 1024, 1032 (1975), aff'd in pertinent part en banc, 553 F. 2d 1277, 1283–1284 n. 18 (1976), cert dismissed *sub nom. McAdams* v. *McSurely*, 438 U. S. 189 (1978).

In "dismissing" the appeal in this case, the Court of Appeals appears to have reasoned that petitioner's appeal lay outside the *Cohen* doctrine because it raised no "serious and unsettled question" of law. This argument was pressed by the respondent, who asked the Court of Appeals to dismiss on the basis of that court's "controlling" decision in *Halperin* v. *Kissinger*, *supra*.

Under the circumstances of this case, we cannot agree that petitioner's interlocutory appeal failed to raise a "serious and unsettled" question. Although the Court of Appeals had ruled in *Halperin* v. *Kissinger* that the President was not en-

titled to absolute immunity, this Court had never so held. And a petition for certiorari in *Halperin* was pending in this Court at the time petitioner's appeal was dismissed. In light of the special solicitude due to claims alleging a threatened breach of essential presidential prerogatives under the separation of powers, see *United States* v. *Nixon*, 418 U. S. 683, 691–692 (1974), we conclude that petitioner did present a "serious and unsettled" and therefore appealable question to the Court of Appeals. It follows that the case was "in" the Court of Appeals under § 1254 and properly within our certiorari jurisdiction.[23]

B

Shortly after petitioner had filed his petition for ceriorari in this Court and respondent had entered his opposition, the parties reached an agreement to liquidate damages.[24] Under its terms the petitioner Nixon paid the respondent Fitzgerald a sum of $142,000. In consideration Fitzgerald agreed to ac-

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[23] There can be no serious doubt concerning our power to review a court of appeals' decision to dismiss for lack of jurisdiction—a power we have exercised routinely. See, *e. g.*, *Gardner* v. *Westinghouse Broadcasting Co.*, 437 U. S. 478 (1978). If we lacked authority to do so, decisions to dismiss for want of jurisdiction would be insulated entirely from review by this Court.

Nor, now that we have taken jurisdiction of the case, need we remand to the Court of Appeals for a decision on the merits. The immunity question is a pure issue of law, appropriate for our immediate resolution. Especially in light of the Court of Appeals' now-binding decision of the issue presented, concerns of judicial economy fully warrant our decision of the important question presented.

[24] Respondent filed a copy of this agreement with the Clerk of this Court on August 24, 1981, as an appendix to his Brief in Opposition to a Motion of Morton, Ina, David, Mark and Gary Halperin to Intervene and for Other Relief. On June 10, 1980, prior to the Court's action on the petition for certiorari, counsel to the parties had advised the Court that their clients had reached an agreement to liquidate damages, but that there remained a live controversy. Counsel did not include a copy of the agreement in their initial submission.

cept liquidated damages of $28,000 in the event of a ruling by this Court that petitioner was not entitled to absolute immunity. In case of a decision upholding petitioner's immunity claim, no further payments would be made.

The limited agreement between the parties left both petitioner and respondent with a considerable financial stake in the resolution of the question presented in this Court. As we recently concluded in a case involving a similar contract, "Given respondents' continued active pursuit of monetary relief, this case remains 'definite and concrete, touching the legal relations of parties having adverse legal interests.'" *Havens Realty Co.* v. *Coleman*, —— U. S. ——, —— (1982), quoting *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240–241 (1937).

III

A

This Court consistently has recognized that government officials are entitled to some form of immunity from suits for civil damages. In *Spalding* v. *Vilas*, 161 U. S. 483 (1896), the Court considered the immunity available to the Postmaster General in a suit for damages based upon his official acts. Drawing upon principles of immunity developed in English cases at common law, the Court concluded that "[t]he interests of the people" required a grant of absolute immunity to public officers. *Id.*, at 498. In the absence of immunity, the Court reasoned, executive officials would hesitate to exercise their discretion in a way "injuriously affect[ing] the claims of particular individuals," *id.*, at 499, even when the public interest required bold and unhesitating action. Considerations of "public policy and convenience" therefore compelled a judicial recognition of immunity from suits arising from official acts.

> "In exercising the functions of his office, the head of an Executive Department, keeping within the limits of his

> authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government, if he were subjected to any such restraint."

Id., at 498.

Decisions subsequent to *Spalding* have extended the defense of immunity to actions besides those at common law. In *Tenney* v. *Brandhove*, 341 U. S. 367 (1951), the Court considered whether the passage of 42 U. S. C. § 1983, which made no express provision for immunity for any official, had abrogated the privilege accorded to state legislators at common law. *Tenney* held that it had not. Examining § 1983 in light of the "presuppositions of our political history" and our heritage of legislative freedom, the Court found it incredible "that Congress . . . would impinge on a tradition so well grounded in history and reason" without some indication of intent more explicit than the general language of the statute. *Id.*, at 376. Similarly, the decision in *Pierson* v. *Ray*, 386 U. S. 547 (1967), involving a § 1983 suit against a state judge, recognized the continued validity of the absolute immunity of judges for acts within the judicial role. This was a doctrine "'not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.'" *Id.*, at 554, quoting, *Scott* v. *Stansfield*, L.R. 3 Ex. 220, 223 (1868). See *Bradley* v. *Fisher*, 13 Wall. 335 (1872). The Court in *Pierson* also held that police officers are entitled to a qualified immunity protecting them from suit when their official acts are performed in "good faith." *Id.*, at 557.

In *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974), the Court considered the immunity available to state executive officials in a

§ 1983 suit alleging the violation of constitutional rights. In that case we rejected the officials' claim to absolute immunity under the doctrine of *Spalding* v. *Vilas*, finding instead that state executive officials possessed a "good faith" immunity from § 1983 suits alleging constitutional violations. Balancing the purposes of § 1983 against the imperatives of public policy, the Court held that "in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based." 416 U. S., at 247.

As construed by subsequent cases, *Scheuer* established a two-tiered division of immunity defenses in § 1983 suits. To most executive officers *Scheuer* accorded qualified immunity. For them the scope of the defense varied in proportion to the nature of their official functions and the range of decisions that conceivably might be taken in "good faith". This "functional" approach also defined a second tier, however, at which the especially sensitive duties of certain officials—notably judges and prosecutors—required the continued recognition of absolute immunity. See, *e. g.*, *Imbler* v. *Pachtman*, 424 U. S. 409 (1976) (state prosecutors possess absolute immunity with respect to the initiation and pursuit of prosecutions); *Stump* v. *Sparkman*, 435 U. S. 349 (1978) (state judge possesses absolute immunity for all judicial acts).

This approach was reviewed in detail in *Butz* v. *Economou*, 438 U. S. 478 (1978), when we considered for the first time the kind of immunity possessed by *federal* executive officials who are sued for constitutional violations.[25] In *Butz* the Court rejected an argument, based on decisions involving federal officials charged with common law torts, that all high

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[25] *Spalding* v. *Vilas*, *supra*, was distinguished on the ground that the suit against the Postmaster General had asserted a common law—and not a constitutional—cause of action. See *Butz*, *supra*, 438 U. S., at 493–495.

federal officials have a right to absolute immunity from constitutional damage actions. Concluding that a blanket recognition of absolute immunity would be anomalous in light of the qualified immunity standard applied to state executive officials, 438 U. S., at 504, we held that federal officials generally have the same qualified immunity possessed by state officials in cases under § 1983. In so doing we reaffirmed our holdings that some officials, notably judges and prosecutors, "because of the special nature of their responsibilities," *id.*, at 511, "require a full exemption from liability." *Id.*, at 508. In *Butz* itself we upheld a claim of absolute immunity for administrative officials engaged in functions analogous to those of judges and prosecutors. *Ibid.* We also left open the question whether other federal officials could show that "public policy requires an exemption of that scope." *Id.*, at 506.

B

Our decisions concerning the immunity of government officials from civil damage liability arguably have not defined a straight line of doctrinal development. Nonetheless, a consistent approach has run throughout. In addressing claims of entitlement to immunity, this Court has recognized that "the law of privilege as a defense to damage actions against officers of Government has 'in large part been of judicial making,'" *Butz* v. *Economou*, *supra*, 438 U. S., at 501–502, quoting *Barr* v. *Matteo*, 360 U. S. 564, 569 (1959); *Doe* v. *McMillan*, 412 U. S. 306, 318 (1973), and that the "federal courts are . . . competent to determine the appropriate level of immunity" of state and federal officials, *Butz* v. *Economou*, *supra*, 438 U. S., at 503. Our decisions of course have been guided by federal statutes and the Constitution. Our cases under § 1983 formally have involved statutory construction. See, *e. g.*, *Tenney* v. *Brandhove*, 341 U. S. 367 (1951). Other decisions rest either on the literal text of the Constitution, *e. g.*, *Powell* v. *McCormack*, 395 U. S. 486, 506 (1969) (recognizing immunity of Congressmen under Speech and Debate Clause),

or on inferences of purpose drawn from constitutional language and structure, *e. g.*, *Gravel* v. *United States*, 408 U. S. 606, 618 (1972) (extending congressional immunity to a congressional aide, in order to "implement [the] fundamental purpose" of the Speech and Debate Clause). Cf. *Butz* v. *Economou*, *supra*, 438 U. S., at 508–517. Nonetheless, at least in the absence of explicit guidance from the Congress, in deciding immunity questions we have relied explicitly on consideration of public policy comparable to those traditionally recognized by courts at common law.[28] We also have examined the scope of the immunity historically afforded to particular officials at common law. See *Butz* v. *Economou*, *supra*, 438 U. S., at 508; *Imbler* v. *Pachtman*, 424 U. S. 409, 421 (1976).

This case now presents the claim that the President of the United States is shielded by absolute immunity from civil damages liability. In the case of the President the historical and policy inquiries tend to converge. Because the Presidency did not exist through most of the development of common law, any historical analysis must draw its evidence primarily from our constitutional structure and heritage. From both sources the relevant evidence involves an ongoing effort to identify the appropriate separation of powers among the branches of government—a concern that also forms the core of our inquiry involving those considerations of "public policy and convenience" traditionally weighed by courts at common law.

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[28] At least three basic rationales support immunity for public officials. First, competent and responsible individuals may be deterred from entering public service in the first place. Second, the prospect of damages liability may render officials unduly cautious in the discharge of their public responsibilities. See *Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (CA2 1949), cert. denied, 339 U. S. 949 (1950). Third, public servants may be distracted from their duties by the need to defend frequent lawsuits. See generally Freed, Executive Official Immunity for Constitutional Violations: An Analysis and a Critique, 72 Nw. L. Rev. 526, 529–530 (1977).

IV

Here a former President asserts his immunity from civil damage claims of two kinds. He stands named as a defendant in a direct action under the Constitution and two statutory actions under federal laws of general applicability. In neither case has Congress taken express legislative action to subject the President to civil liability for his official acts.[27]

Applying the principles of our cases to claims of this kind, we hold that petitioner, as a former President of the United States, is entitled to absolute immunity from damages liability predicated on his official acts. We consider this immunity a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and justified by considerations of public policy.

A

The President occupies a unique position in the constitutional scheme. Article II of the Constitution provides that "The executive Power shall be vested in a President of the United States. . . ." This grant of authority establishes the President as the chief constitutional officer of the Executive branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity. These include the administration of justice—it is the President who is charged constitutionally to "take care that the laws be faithfully executed";[28] the conduct of foreign affairs—a realm in which the Court has recognized that "It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information

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[27] We know of no instance in the history of our country in which Congress has given serious consideration to imposing civil damage suit liability on a President. A congressional attempt to do so would present a serious constitutional issue that we have no occasion to consider in this case.

[28] U. S. Const., Art II, § 3.

properly held secret";[29] and management of the personnel of the Executive branch—a task for which "imperative reasons requir[e] an unrestricted power [in the President] to remove the most important of his subordinates in their most important duties."[30]

In arguing that the President is entitled only to qualified immunity,[31] the respondent relies on cases in which we have recognized immunity of this scope for governors and cabinet officers. *E. g., Butz* v. *Economou, supra*; *Scheuer* v. *Rhodes, supra*. We find these cases to be inapposite. The President's unique status under the Constitution distinguishes him from other executive officials.[32]

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[29] *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U. S. 103, 111 (1948).

[30] *Myers* v. *United States*, 272 U. S. 52, 134–135 (1926).

[31] Under the "good faith" standard, as it has been formulated in such cases as *Wood* v. *Strickland*, 420 U. S. 308, 322 (1975), an official would be held immune from damages liability unless "he knew or reasonably should have known that the action he took within his sphere of official responsibility" was unconstitutional or "he took the action with malicious intention to cause a deprivation of constitutional rights or other injury. . . ."

[32] Noting that the "Speech and Debate Clause" provides a textual basis for congressional immunity, respondent argues that the Framers must be assumed to have rejected any similar grant of Executive immunity. Petitioner, on the other hand, offers historical arguments that the Framers affirmatively assumed Presidential immunity to have been established by the adoption of the constitutional scheme. Although we need not embrace petitioner's argument in order to decide this case, we do reject respondent's contention that the constitutional text and structure somehow prohibit a judicial recognition of absolute immunity. There are two difficulties with respondent's argument. First, a specific textual basis has not been considered a prerequisite to the recognition of immunity. No provision expressly confers judicial immunity. Yet the immunity of judges is well settled. See, *e. g., Bradley* v. *Fisher*, 13 Wall 335 (1872); *Stump* v. *Sparkman, supra*. Second, this Court already has established that absolute immunity may be extended to certain officials of the Executive Branch. *Butz* v. *Economou, supra*, 438 U. S., at 511–512; see *Imbler* v. *Pachtman, supra* (extending immunity to prosecutorial officials within the Executive branch).

Similarly, the importance and scope of the President's powers and duties render him particularly vulnerable to suits for civil damages.[33] In view of the special prominence of his office and the effect of his actions on countless people, the President would be an easily identifiable target of damage actions by disgruntled citizens.[34] The matters with which a President must concern himself are likely to "arouse the most intense feelings." *Pierson* v. *Ray*, *supra*, 386 U. S., at 554. Yet it is precisely in such cases that there exists the greatest public interest in providing the President "the maximum ability to deal fearlessly and impartially with" the duties of his office. *Ferri* v. *Ackerman*, 444 U. S. 193, 203 (1979) (footnote omitted). For example, it would be intolerable to instill in the President a hesitancy to remove inefficient or even disloyal personnel. Exposure of the President to damages actions also could distort the process of decisionmaking at the highest levels of the executive branch. Anticipating lawsuits against the President, the President and his advisers naturally would have an incentive to devote scarce energy, not to performance of their public duties, but to compilation of a record insulating the President from subsequent liability. In view of the singular importance of the President's duties, the threatened diversion of his energies by private lawsuits would raise unique risks to public policy.[35]

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[33] Cf. J. Story, Commentaries on the Constitution of the United States, § 1563, at 418–419 (1833 ed.):

"There are . . . incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions, which are confided to it. Among these, must necessarily be included the power to perform them . . . . The president cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability."

[34] These dangers are significant even though there is no historical record of numerous suits against the President, since a right to sue federal officials for damages for constitutional violations was not even recognized until *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971).

[35] Even in the case of officials possessing absolute immunity, this Court generally has held that this immunity extends only to acts in performance

B

In deference to the President's singular constitutional mandate, the courts traditionally have asserted their jurisdiction over him with respectful caution and restraint. This Court

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of particular functions. See *Butz* v. *Economou*, *supra*, 438 U. S., at 508–517; cf. *Imbler* v. *Pachtman*, *supra*, 424 U. S., at 430–431. In the case of the President, however, powerful reasons counsel rejection of a selective approach.

Under the Constitution and laws of the United States the President has discretionary responsibilities in a broad variety of areas, many of which are highly sensitive. In many cases it would be difficult to determine which Presidential "function" encompassed a particular action. Thus, in order to administer functional distinctions among Presidential actions, judges frequently would need to inquire into the *purpose* for which acts were taken. Inquiries of this kind could be highly intrusive.

In determining the proper scope of an absolute privilege, this Court repeatedly has refused to draw lines finer than history and reason would support. See, *e. g.*, *Spalding* v. *Vilas*, *supra*, 161 U. S., at 498 (privilege extends to all matters "committed by law to [an official's] control or supervision"); *Barr* v. *Matteo*, *supra*, 360 U. S., at 575 (fact "that the action here taken was within the outer perimeter of petitioner's line of duty is enough to render the privilege applicable. . . ."); *Stump* v. *Sparkman*, *supra*, 435 U. S., at 368 and n. 12 (judicial privilege applies even to acts occurring outside "the normal attributes of a judicial proceeding"). In view of the special nature of the President's constitutional office, we think it appropriate to extend to him absolute immunity from damage actions based on acts within the "outer perimeter" of the area of his official responsibility.

In this case respondent argues that petitioner Nixon would have acted outside the perimeter of his duties by ordering the discharge of respondent Fitzgerald, who was lawfully entitled to retain his job in the absence of "such cause as will promote the efficiency of the service." Brief for Respondent, at 39, citing 5 U. S. C. § 7512(a). Because Congress has granted this legislative protection, respondent argues, no federal official could, within his authority, cause Fitzgerald to be dismissed without satisfying this standard of proof in prescribed statutory proceedings.

This construction of the President's authority would subject him to trial on every allegation that an allegedly tortious action was taken for a forbidden purpose. Adoption of this construction thus would deprive absolute immunity of its intended effect.

It clearly is within the President's authority to "prescribe" the manner in

never has held that courts may compel the President to perform even ministerial functions.[36] By contrast, injunctions compelling action by other officials long have been upheld.[37] A similar distinction is reflected in the approach of this Court

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which the Secretary will "conduct the business" of the Air Force. 10 U. S. C. § 8012(b). Because this mandate includes the authority to prescribe reorganizations and reductions in force, petitioner's alleged wrongful acts lay well within the outer perimeter of his authority.

[36] Although this issue has not been faced squarely by the Court, there have been strong statements in previous opinions asserting the immunity of the President from judicial orders. In *Mississippi* v. *Johnson*, 71 U. S. 475, 501 (1866), the Court stated: "we are fully satisfied that this court has no jurisidiction of a bill to enjoin the President in the performance of his official duties; and that no such bill ought to be received by us." And in *Kendall* v. *United States*, 12 Pet. 524, 610 (1838), it is stated: "The executive power is vested in a President; and as far as his powers are derived from the consitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeaching power."

Strong historical considerations support the traditional judicial reluctance to enjoin action by the President. At the time of the first Congress, Vice President John Adams and Oliver Ellsworth, Senator from Connecticut, were reported as stating that "the President, personally, was not subject to any process whatever; could have no action whatever brought against him; and above the power of all judges, justices, etc." since otherwise a court could "stop the whole machine of Government." 167 W. Maclay, Journal of W. Maclay (E. Maclay ed. 1890). Justice Story offered a similar argument somewhat later. See 3 J. Story, Commentaries on the Constitution of the United States § 1563, at 418–419 (1st ed. 1833).

It also is clear that Thomas Jefferson believed the President not to be subject to judicial process. When Chief Justice Marshall held in *United States* v. *Burr*, 25 Fed. Cas. 30 (1807), that a subpoena duces tecum can be issued to a President, Jefferson protested strongly, and stated his broader view of the proper relationship between the Judiciary and the President:

"The leading principle of our Constitution is the independence of the Legislature, executive and judiciary of each other, and none are more jealous of this than the judiciary. But would the executive be independent of the judiciary, if he were subject to the *commands* of the latter, & to imprisonment for disobedience; if the several courts could bandy him from pillar to post, keep him constantly trudging from north to south & east to west, and withdraw him entirely from his constitutional duties? The intention of the Constitution, that each branch should be independent of the

to cases in which various officials have claimed an evidentiary privilege. The courts generally have looked to the common law to determine the scope of an official's privilege.[38] In considering claims by the President, however, we have recognized that Presidential immunity is "rooted in the separation of powers under the Constitution." *United States* v. *Nixon*, 418 U. S. 683, 708 (1974).

It is settled law that the separation of powers doctrine does not bar every exercise of jurisdiction over the President of the United States. See, *e. g.*, *United States* v. *Nixon*, *supra*; *United States* v. *Burr*, 25 Fed. Cases 191, 196 (1807); cf. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952).[39] But our cases also have recognized that a court, before exercising jurisdiction, must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the executive branch.[40] When judicial action is needed to serve broad public interests—as when the Court acts, not in derogation of the separation of powers, but to maintain their proper balance,

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others, is further manifested by the means it has furnished to each, to protect itself from enterprises of force attempted on them by the others, and to none has it given more effectual or diversified means than to the executive." 10 The Works of Thomas Jefferson 404n. (P. Ford ed. 1905) (quoting a letter from President Jefferson to a prosecutor at the Burr trial) (emphasis in the original). See also 5 D. Malone, Jefferson and His Time: Jefferson the President 320–325 (1974).

[38] See *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952) (injunction directed to Secretary of Commerce); *Kendall* v. *United States*, *supra* (mandamus to enforce ministerial duty of the Postmaster General).

[39] See *United States* v. *Reynolds*, 345 U. S. 1, 6–7 (1953) (Secretary of the Air Force); *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 323–324 (DDC 1966), aff'd, 384 F. 2d 979 (CADC), cert denied, 389 U. S. 952 (1967) (Department of Justice officials).

[39] Although the President was not a party, the Court enjoined the Secretary of Commerce from executing a direct presidential order. See 343 U. S., at 583.

[40] See *Nixon* v. *General Services Administration*, 433 U. S. 425, 439 (1977); *United States* v. *Nixon*, 418 U. S. 683 (1974).

cf. *Youngstown Sheet & Tube Co.* v. *Sawyer*, *supra*—the exercise of jurisdiction has been held warranted. In the case of this merely private suit for damages based on a President's official acts, we hold it is not.[41]

V

A rule of absolute immunity for the President will not leave the Nation without sufficient remedies for misconduct on the part of the chief executive.[42] There remains first the constitutional remedy of impeachment.[43] In addition, Presi-

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[41] It never has been denied that absolute immunity may impose a serious cost on the individuals whose rights have been violated. As Judge Learned Hand wrote in *Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (CA2 1949), cert denied, 339 U. S. 949 (1950):

"It does indeed go without saying that an oficial, who is in fact guilty of using his powers to vent his spleen upon others, or for any personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for . . . [denying recovery] is that it is impossible to know whether the claim is well founded until the case has been tried, and to submit all officials, the innocent as well as the guilty, to the burden of trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute. . . . As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative."

In weighing the balance of advantages, this Court has found that there is a lesser public interest in actions for civil damages than, for example, in criminal prosecutions. See *United States* v. *Gillock*, 445 U. S. 360, 371–373 (1980); cf. *United States* v. *Nixon*, *supra*, 418 U. S., at 711–712 and n. 19 (basing holding on special importance of evidence in a criminal trial and distinguishing civil actions as raising different questions not presented for decision).

[42] The presence of alternative remedies has played an important role in our previous decisions in the area of official immunity. *E. g.*, *Imbler* v. *Pachtman*, *supra*, 424 U. S., at 428–429 ("We emphasize that the immunity of prosecutors from liability in suits under § 1983 does not leave the public powerless to deter misconduct or to punish that which occurs.").

[43] The same remedy plays a central role with respect to the misconduct of federal judges, who also possess absolute immunity. See Kaufman, Chilling Judicial Independence, 88 Yale L.J. 681, 690–706 (1979). Congressmen may be removed from office by a vote of their colleagues. U. S.

dents may be prosecuted criminally, at least after they leave office. Moreover, there are informal checks on Presidential action that do not apply with equal force to other executive officials. The President is subjected to constant scrutiny by Congress and by the press. The vigilance of these institutions may serve to deter Presidential abuses of office, as well as to make credible the threat of impeachment.[44] Other incentives to avoid misconduct may include a desire to earn reelection, the need to maintain prestige as an element of Presidential influence, and a President's traditional concern for his historical stature.

The existence of alternative remedies and deterrents establishes that absolute immunity will not place the President "above the law." For the President, as for judges and prosecutors, absolute immunity merely precludes a particular private remedy for alleged misconduct in order to advance compelling public ends.

VI

For the reasons stated in this opinion, the decision of the Court of Appeals is reversed and the case remanded for action consistent with this opinion.

So ordered.

Const., Art. I, § 5, cl. 2.

[44] Prior to petitioner Nixon's resignation from office, the House Judiciary Committee had convened impeachment hearings. See generally Report of the Committee on the Judiciary of the House of Representatives: Impeachment of Richard M. Nixon President of the United States, H.R. Rep. No. 93–1305 (1974).

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To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

LFP

From: **Justice Powell**

Circulated: _____

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1738

RICHARD NIXON, PETITIONER, *v.*
A. ERNEST FITZGERALD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[March ——, 1982]

JUSTICE POWELL delivered the opinion of the Court.

The plaintiff in this lawsuit seeks relief in civil damages from a former President of the United States. The claim rests on actions allegedly taken during the former President's tenure in office. The issue before us is the scope of the immunity possessed by the President of the United States.

in his official capacity

I

In January 1970 the respondent A. Ernest Fitzgerald lost his job as a management analyst with the Department of the Air Force. Fitzgerald's dismissal occurred in the context of a departmental reorganization and reduction in force, in which his job was eliminated. In announcing the reorganization, the Air Force characterized the action as taken to promote economy and efficiency in the armed forces.

Respondent's discharge attracted unusual attention in Congress and in the press. Fitzgerald had attained national prominence approximately one year earlier, during the waning months of the presidency of Lyndon B. Johnson. On November 13, 1968, Fitzgerald appeared before the Subcommittee on Economy in Government of the Joint Economic Committee of the United States Congress. To the apparent embarrassment of his superiors in the Department of Defense, Fitzgerald testified that cost-overruns on the C-5A

transport plane could approximate $2 billion.[1] He also revealed that unexpected technical difficulties had arisen during the development of the aircraft.

Concerned that Fitzgerald might have suffered retaliation for his congressional testimony, the Subcommittee on Economy in Government convened public hearings on Fitzgerald's dismissal.[2] The press reported those hearings prominently, as it had the earlier announcement that his job was being eliminated by the Department of Defense. At a news conference on December 8, 1969, President Richard Nixon was queried about Fitzgerald's impending separation from government service.[3] The President responded by promising to

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[1] See *Economics of Military Procurement: Hearings Before the Subcommittee on Economy in Government of the Joint Economic Comm.*, 90th Cong., 2d Sess., Part I, at 199–201 (1968–1969). It is not disputed that officials in the Department of Defense were both embarrassed and angered by Fitzgerald's testimony. Within less than two months of respondent's congressional appearance, staff had prepared a memorandum for the outgoing Secretary of the Air Force, Harold Brown, listing three ways in which Fitzgerald might be removed from his position. See App. 209–211 (Memorandum of John Lang to Harold Brown, Jan. 6, 1969). Among these was a "reduction in force"—the means by which Fitzgerald ultimately was removed by Brown's successor in office under the new Nixon administration. The reduction in force was announced publicly on November 4, 1969, and Fitzgerald accordingly was separated from the Air Force upon the elimination of his job on January 5, 1970.

[2] See *The Dismissal of A. Ernest Fitzgerald by the Department of Defense: Hearings Before the Subcomm. on Economy in Government of the Joint Economic Comm.*, 91st Cong., 1st Sess. (1969). Some 60 Members of Congress also signed a letter to the President protesting the "firing of this dedicated public servant" as a "punitive action." *Id.*, at 115–116, App., at 177–179.

[3] A briefing memorandum on the Fitzgerald matter had been prepared by White House staff in anticipation of a possible inquiry at the forthcoming press conference. Authored by aide Patrick Buchanan, it advanced the view that the Air Force was "firing . . . a good public servant." App. 269 (Memorandum of Patrick Buchanan to Richard Nixon, December 5, 1969). The memorandum suggested that the President order Fitzgerald's retention by the Defense Department.

look into the matter.[4] Shortly after the news conference the petitioner asked White House Chief of Staff H.R. Haldeman to arrange for Fitzgerald's assignment to another job within the Administration.[5] It also appears that the President suggested to Budget Director Robert Mayo that Fitzgerald might be offered a position in the Bureau of the Budget.[6]

Fitzgerald's proposed reassignment encountered resistance within the Administration.[7] In an internal memorandum of January 20, 1970, White House aide Alexander Butterfield reported to Haldeman that "Fitzgerald is no doubt a top-notch cost expert, but he must be given very low marks in loyalty; and after all, loyalty is the name of the game."[8] Butterfield therefore recommended that "We should let him bleed, for a while at least."[9] There is no evi-

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[4] App. 228.

[5] See App. 109–112 (Deposition of H.R. Haldeman); App. 137–141 (Deposition of petitioner Richard Nixon). Haldeman's deposed testimony was based on his handwritten notes of December 12, 1969. App. 275.

[6] See App. 126 (Deposition of Robert Mayo); App. 141 (Deposition of Richard Nixon).

[7] Both Mayo and his deputy, James Schlesinger, appear to have resisted at least partly due to a suspicion that Fitzgerald lacked institutional loyalty to Executive policies and that he spoke too freely in communications with friends on Capitol Hill. Both also stated that high level positions were presently unavailable within the Bureau of the Budget. See App. 126 (Deposition of Robert Mayo); App. 146–147 (Deposition of James Schlesinger).

[8] Quoted in *Decision on the Appeal of A. Ernest Fitzgerald* (*CSC Decision*), App., at 60, 84 (September 18, 1973).

[9] *Id.*, at 85. The memorandum added that "We owe 'first choice on Fitzgerald' to [Senator] Proxmire and others who tried so hard to make him a hero [for exposing the cost overruns]." Suspicion of Fitzgerald's assumed loyalty toward Senator Proxmire was widely shared in the White House and in the Defense Department. According to the *CSC Decision*, *supra*, App., at 83:

"While Mr. Fitzgerald has denied that he was 'Senator Proxmire's boy in the Air Force,' and he may honestly believe it, we find this statement difficult to accept. It is evident that the top officials in the Air Force, without specifically saying so, considered him to be just that. . . . We also note

dence of White House efforts to reemploy Fitzgerald subsequent to the Butterfield memorandum.

Absent any offer of alternative federal employment, Fitzgerald complained to the Civil Service Commission. In a letter of January 20, 1970, he alleged that his separation represented unlawful retaliation for his truthful testimony before a congressional committee.[10] The Commission convened a closed hearing on Fitzgerald's allegations on May 4, 1971. Fitzgerald, however, preferred to present his grievances in public. After he had brought suit and won an injunction, *Fitzgerald* v. *Hampton*, 467 F. 2d 755 (CADC 1972), public hearings commenced on January 26, 1973. The hearings again generated publicity, much of it devoted to the testimony of Air Force Secretary Robert Seamans. Although he denied that Fitzgerald had lost his position in retaliation for congressional testimony, Seamans testified that he had received "some advice" from the White House before Fitzgerald's job was abolished.[11] But the Secretary declined to be more specific. He responded to several questions by invoking "executive privilege."[12]

At a news conference on January 31, 1973, the President was asked about Mr. Seamans' testimony. Mr. Nixon took the opportunity to assume personal responsibility for Fitzgerald's dismissal:

> "I was totally aware that Mr. Fitzgerald would be fired or discharged or asked to resign. I approved it and Mr. Seamans must have been talking to someone who had discussed the matter with me. No, this was not a case of some person down the line deciding he

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that upon leaving the Air Force Mr. Fitzgerald was employed as a consultant by the Proxmire Committee and that Senator Proxmire appeared at the Commission hearing as a character witness for [Fitzgerald]."

[10] See *CSC Decision*, App., at 61.

[11] See *id.*, at 83–84.

[12] See *ibid.*

should go. It was a decision that was submitted to me. I made it and I stick by it."[13]

A day later, however, the White House press office issued a retraction of the President's statement. According to a press spokesman, the President had confused Fitzgerald with another former executive employee. On behalf of the President, the spokesman asserted that Mr. Nixon had not had "put before him the decision regarding Mr. Fitzgerald."[14]

After hearing over 4,000 pages of testimony, the Chief Examiner for the Civil Service Commission issued his decision in the Fitzgerald case on September 18, 1973. *Decision on the Appeal of A. Ernest Fitzgerald*, App., at 60. The Examiner held that Fitzgerald's dismissal had offended applicable civil service regulations. App. 86–87.[15] The Examiner based this conclusion on a finding that the departmental reorganization in which Fitzgerald lost his job, though purportedly implemented as an economy measure, was in fact moti-

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[13] App. 185. A few hours after the press conference, Mr. Nixon repeated privately to Presidential aide Charles Colson that he had ordered Fitzgerald's firing. App. 214–215 (recorded conversation of Jan. 31, 1973).

[14] App. 196 (transcription of statement of White House press secretary Ronald Ziegler, Feb. 1, 1973). In a conversation with aide John Ehrlichman, following his conversation with Charles Colson, see *supra* note 13, the President again had claimed responsibility for Fitzgerald's dismissal. When Ehrlichman corrected him on several details, however, the President concluded that he was "thinkin' of another case." App. 218 (recorded conversation of Jan. 31, 1973). See *id.*, at 220. It was after this conversation that the retraction was ordered.

[15] Fitzgerald's position in the Air Force was in the "excepted service" and therefore not covered by civil service rules and regulations for the competitive service. *Fitzgerald* v. *Hampton*, 467 F. 2d 755, 758 (CADC 1972); see *CSC Decision*, App., at 63–64. In *Hampton*, however, the court held that Fitzgerald's employment nonetheless was under "legislative protection," since he was a "preference eligible" veteran entitled to various statutory protections under the Veterans Preference Act. See 467 F. 2d, at 758–768. Among these were the benefits of the reduction in force procedures established by civil service regulation. See 467 F. 2d, at 758.

vated by "reasons purely personal to" respondent. *Id.*, at 86. As this was an impermissible basis for a reduction in force,[16] the Examiner recommended Fitzgerald's reappointment to his old position or to a job of comparable authority.[17] The Examiner, however, explicitly distinguished this narrow conclusion from a suggested finding that Fitzgerald had suffered retaliation for his testimony to Congress. As found by the Commission, "the evidence in the record does not support [Fitzgerald's] allegation that his position was abolished and that he was separated . . . in retaliation for his having revealed the C–5A cost overrun in testimony before the Proxmire Committee on November 13, 1968." *Id.*, at 81.

Following the Commission's decision, Fitzgerald filed a suit for damages in the United States District Court. In it he raised essentially the same claims presented to the Civil Service Commission.[18] As defendants he named eight officials of the Defense Department, White House aide Alex-

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[16] The Examiner found that Fitzgerald in fact was dismissed because of his superiors' dissatisfaction with his job performance. *CSC Decision*, App., at 86–87. Their attitude was evidenced by "statements that he was not a 'team player' and 'not on the Air Force team.'" App. 88. Without deciding whether this would have been an adequate basis for an "adverse action" against Fitzgerald as an "inadequate or unsatisfactory employee," *id.*, at 86, the Examiner held that the Commission's adverse action procedures, current version codified at 5 CFR § 752, implicitly forbade the Air Force to employ a "reduction in force" as a means of dismissing respondent for reasons "personal to" him. App. 87.

[17] The Commission also ordered that Fitzgerald should receive back pay. *CSC Decision*, App., at 87–88. Despite the Commission's order, respondent avers that he "has still not obtained reinstatement to a position equivalent to his former one," Brief for Respondent, at 11, n. 17, and that he therefore has brought an enforcement action in the District Court.

[18] The complaint alleged a continuing conspiracy to deprive him of his job, to deny him reemployment, and to besmirch his reputation. Fitzgerald alleged that the conspiracy had continued through the Commission hearings and remained in existence at the initiation of the lawsuit. See *Fitzgerald* v. *Seamans*, 384 F. Supp. 688, 690–692 (DC 1974).

ander Butterfield, and "one or More" unnamed "White House Aides" styled only as "John Does."

The District Court dismissed the action under the District of Columbia's three-year statute of limitations, *Fitzgerald* v. *Seamans*, 384 F. Supp. 688 (D.D.C. 1974), and the Court of Appeals affirmed as to all but one defendant, White House aide Alexander Butterfield, *Fitzgerald* v. *Seamans*, 553 F. 2d 220 (CADC 1977). The Court of Appeals reasoned that Fitzgerald had no reason to suspect White House involvement in his dimissal at least until 1973. In that year, reasonable grounds for suspicion had arisen, most notably through publication of the internal White House memorandum in which Butterfield had recommended that Fitzgerald at least should be made to "bleed for a while" before being offered another job in the Administration. *Id.*, at 225, 229. Holding that concealment of illegal activity would toll the statute of limitations, the Court of Appeals remanded the action against Butterfield for further proceedings in the District Court.

Following the remand and extensive discovery thereafter, Fitzgerald filed a Second Amended Complaint in the District Court on July 5, 1978. It was in this amended complaint—more than eight years after he had complained of his discharge to the Civil Service Commission—that Fitzgerald first named the petitioner Nixon as a party defendant.[19] Also included as defendants were White House aide Bryce Harlow and other officials of the Nixon administration. Additional discovery ensued. By March 1980, only three defendants remained: the petitioner Richard Nixon and White House aides

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[19] The general allegations of the complaint remained essentially unchanged. In averring Nixon's participation in the alleged conspiracy against him, the complaint quoted petitioner's press conference statement that he was "totally aware" of and in fact "approved" Fitzgerald's dismissal. Second Amended Complaint, at 6.

Harlow and Butterfield. Denying a motion for summary judgment, the District Court ruled that the action must proceed to trial. Its order of March 26 held that Fitzgerald had stated triable causes of action under two federal statutes and the First Amendment to the Constitution.[20] The Court also ruled that petitioner was not entitled to claim absolute presidential immunity.

Petitioner took a collateral appeal of the immunity decision to the Court of Appeals for the District of Columbia Circuit. The Court of Appeals dismissed summarily. It apparently did so on the ground that its recent decision in *Halperin* v. *Kissinger*, 606 F. 2d 1192 (CADC 1979), aff'd by an equally

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[20] See Appendix to Petition for Certiorari, at 1a–2a. The District Court held that respondent was entitled to "infer" a cause of action under 5 U. S. C. § 7211 and 18 U. S. C. § 1505. Neither expressly confers a private right to sue for relief in damages. The first, 5 U. S. C. § 7211 (Supp. III 1979), provides generally that "The right of employees . . . to . . . furnish information to either House of Congress, or to a committee or a Member thereof, may not be interfered with or denied." The second, 18 U. S. C. § 1505, is a criminal statute making it a crime to obstruct congressional testimony. The correctness of the decision that a cause of action could be "implied" under these statutes is not currently before us. Neither is the question whether the courts, under the direct authority of the First Amendment, may recognize a private action against the President for relief in damages. Cf. *Carlson* v. *Green*, 446 U. S. 14, 19 (1980) (in direct constitutional actions against officials with "independent status in our constitutional scheme . . . judicially created remedies . . . might be inappropriate"); *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388, 396 (1971) (upholding judicial recognition of a nonstatutory damages remedy for Fourth Amendment violations in cases "involv[ing] no special factors counselling hesitation in the absence of affirmative action by Congress"). As explained *infra*, this case is here under the "collateral order" doctrine, for review of the District Court's denial of petitioner's motion to dismiss on the ground that he enjoyed absolute immunity from civil suit. The District Court also held that respondent had stated a claim under the common law of the District of Columbia, but respondent subsequently abandoned his common law cause of action. See Respondent's Supplemental Brief, at 2 (May 14, 1980).

divided vote, 452 U. S. 713 (1981), had rejected this claimed immunity defense.

As this Court has not ruled on the scope of immunity available to a President of the United States, we granted certiorari to decide this important issue. 452 U. S. 957 (1981).

II

Before addressing the merits of this case, we must consider two challenges to our jurisdiction. In his opposition to the petition for certiorari, respondent argued that this Court is without jurisdiction to review the non-final order in which the District Court rejected petitioner's claim to absolute immunity.[21] We also must consider an argument that an agreement between the parties has mooted the controversy.

A

Petitioner invokes the jurisdiction of this Court under 28 U. S. C. § 1254, a statute that invests us with authority to review "[c]ases in" the courts of appeals.[22] When the petitioner in this case sought review of an interlocutory order denying his claim to absolute immunity, the Court of Appeals dismissed the appeal for lack of jurisdiction. Emphasizing the "jurisdictional" basis for the Court of Appeals' decision, respondent argued that the District Court's order was not an appealable "case" properly "in" the Court of Appeals within the meaning of § 1254. We do not agree.

Under the "collateral order" doctrine of *Cohen* v. *Benefi-*

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[21] See Brief for Respondent in Opposition to the Petition for Certiorari, at 2. Although Fitzgerald has not continued to urge this argument, the challenge was jurisdictional, and we therefore address it.

[22] The statute provides in pertinent part:

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. . . .

28 U. S. C. § 1254.

cial Industrial Loan Corp., 337 U. S. 541 (1949), a small class of interlocutory orders are immediately appealable to the courts of appeals. As defined by *Cohen*, this class embraces orders that "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and [are] effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 468 (1978); see *Cohen*, *supra*, 337 U. S., at 546–547. As an additional requirement, *Cohen* established that a collateral appeal of an interlocutory order must "present[] a serious and unsettled question." 337 U. S., at 547. At least twice before this Court has held that orders denying claims of absolute immunity are appealable under the *Cohen* criteria. See *Helstoski* v. *Meanor*, 442 U. S. 500 (1979) (claim of immunity under the Speech and Debate Clause); *Abney* v. *United States*, 431 U. S. 651 (1977) (claim of immunity under Double Jeopardy Clause). In previous cases the Court of Appeals for the District of Columbia Circuit also has treated orders denying absolute immunity as appealable under *Cohen*. See *Briggs* v. *Goodwin*, 569 F. 2d 10, 58–60 (CADC 1977) (Wilkey, J., writing separately for the Court on the appealability issue); *McSurely* v. *McClellan*, 521 F. 2d 1024, 1032 (1975), aff'd in pertinent part en banc, 553 F. 2d 1277, 1283–1284 n. 18 (1976), cert dismissed *sub nom. McAdams* v. *McSurely*, 438 U. S. 189 (1978).

In "dismissing" the appeal in this case, the Court of Appeals appears to have reasoned that petitioner's appeal lay outside the *Cohen* doctrine because it raised no "serious and unsettled question" of law. This argument was pressed by the respondent, who asked the Court of Appeals to dismiss on the basis of that court's "controlling" decision in *Halperin* v. *Kissinger*, *supra*.

Under the circumstances of this case, we cannot agree that petitioner's interlocutory appeal failed to raise a "serious and unsettled" question. Although the Court of Appeals had ruled in *Halperin* v. *Kissinger* that the President was not en-

titled to absolute immunity, this Court had never so held. And a petition for certiorari in *Halperin* was pending in this Court at the time petitioner's appeal was dismissed. In light of the special solicitude due to claims alleging a threatened breach of essential presidential prerogatives under the separation of powers, see *United States* v. *Nixon*, 418 U. S. 683, 691–692 (1974), we conclude that petitioner did present a "serious and unsettled" and therefore appealable question to the Court of Appeals. It follows that the case was "in" the Court of Appeals under § 1254 and properly within our certiorari jurisdiction.[23]

B

Shortly after petitioner had filed his petition for ceriorari in this Court and respondent had entered his opposition, the parties reached an agreement to liquidate damages.[24] Under its terms the petitioner Nixon paid the respondent Fitzgerald a sum of $142,000. In consideration Fitzgerald agreed to ac-

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[23] There can be no serious doubt concerning our power to review a court of appeals' decision to dismiss for lack of jurisdiction—a power we have exercised routinely. See, *e. g.*, *Gardner* v. *Westinghouse Broadcasting Co.*, 437 U. S. 478 (1978). If we lacked authority to do so, decisions to dismiss for want of jurisdiction would be insulated entirely from review by this Court.

Nor, now that we have taken jurisdiction of the case, need we remand to the Court of Appeals for a decision on the merits. The immunity question is a pure issue of law, appropriate for our immediate resolution. Especially in light of the Court of Appeals' now-binding decision of the issue presented, concerns of judicial economy fully warrant our decision of the important question presented.

[24] Respondent filed a copy of this agreement with the Clerk of this Court on August 24, 1981, as an appendix to his Brief in Opposition to a Motion of Morton, Ina, David, Mark and Gary Halperin to Intervene and for Other Relief. On June 10, 1980, prior to the Court's action on the petition for certiorari, counsel to the parties had advised the Court that their clients had reached an agreement to liquidate damages, but that there remained a live controversy. Counsel did not include a copy of the agreement in their initial submission.

cept liquidated damages of $28,000 in the event of a ruling by this Court that petitioner was not entitled to absolute immunity. In case of a decision upholding petitioner's immunity claim, no further payments would be made.

The limited agreement between the parties left both petitioner and respondent with a considerable financial stake in the resolution of the question presented in this Court. As we recently concluded in a case involving a similar contract, "Given respondents' continued active pursuit of monetary relief, this case remains 'definite and concrete, touching the legal relations of parties having adverse legal interests.'" *Havens Realty Co.* v. *Coleman*, —— U. S. ——, —— (1982), quoting *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240–241 (1937).

III

A

This Court consistently has recognized that government officials are entitled to some form of immunity from suits for civil damages. In *Spalding* v. *Vilas*, 161 U. S. 483 (1896), the Court considered the immunity available to the Postmaster General in a suit for damages based upon his official acts. Drawing upon principles of immunity developed in English cases at common law, the Court concluded that "[t]he interests of the people" required a grant of absolute immunity to public officers. *Id.*, at 498. In the absence of immunity, the Court reasoned, executive officials would hesitate to exercise their discretion in a way "injuriously affect[ing] the claims of particular individuals," *id.*, at 499, even when the public interest required bold and unhesitating action. Considerations of "public policy and convenience" therefore compelled a judicial recognition of immunity from suits arising from official acts.

> "In exercising the functions of his office, the head of an Executive Department, keeping within the limits of his

> authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government, if he were subjected to any such restraint."

Id., at 498.

Decisions subsequent to *Spalding* have extended the defense of immunity to actions besides those at common law. In *Tenney* v. *Brandhove*, 341 U. S. 367 (1951), the Court considered whether the passage of 42 U. S. C. § 1983, which made no express provision for immunity for any official, had abrogated the privilege accorded to state legislators at common law. *Tenney* held that it had not. Examining § 1983 in light of the "presuppositions of our political history" and our heritage of legislative freedom, the Court found it incredible "that Congress . . . would impinge on a tradition so well grounded in history and reason" without some indication of intent more explicit than the general language of the statute. *Id.*, at 376. Similarly, the decision in *Pierson* v. *Ray*, 386 U. S. 547 (1967), involving a § 1983 suit against a state judge, recognized the continued validity of the absolute immunity of judges for acts within the judicial role. This was a doctrine "'not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.'" *Id.*, at 554, quoting, *Scott* v. *Stansfield*, L.R. 3 Ex. 220, 223 (1868). See *Bradley* v. *Fisher*, 13 Wall. 335 (1872). The Court in *Pierson* also held that police officers are entitled to a qualified immunity protecting them from suit when their official acts are performed in "good faith." *Id.*, at 557.

In *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974), the Court considered the immunity available to state executive officials in a

§ 1983 suit alleging the violation of constitutional rights. In that case we rejected the officials' claim to absolute immunity under the doctrine of *Spalding* v. *Vilas*, finding instead that state executive officials possessed a "good faith" immunity from § 1983 suits alleging constitutional violations. Balancing the purposes of § 1983 against the imperatives of public policy, the Court held that "in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based." 416 U. S., at 247.

As construed by subsequent cases, *Scheuer* established a two-tiered division of immunity defenses in § 1983 suits. To most executive officers *Scheuer* accorded qualified immunity. For them the scope of the defense varied in proportion to the nature of their official functions and the range of decisions that conceivably might be taken in "good faith". This "functional" approach also defined a second tier, however, at which the especially sensitive duties of certain officials—notably judges and prosecutors—required the continued recognition of absolute immunity. See, *e. g.*, *Imbler* v. *Pachtman*, 424 U. S. 409 (1976) (state prosecutors possess absolute immunity with respect to the initiation and pursuit of prosecutions); *Stump* v. *Sparkman*, 435 U. S. 349 (1978) (state judge possesses absolute immunity for all judicial acts).

This approach was reviewed in detail in *Butz* v. *Economou*, 438 U. S. 478 (1978), when we considered for the first time the kind of immunity possessed by *federal* executive officials who are sued for constitutional violations.[25] In *Butz* the Court rejected an argument, based on decisions involving federal officials charged with common law torts, that all high

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[25] *Spalding* v. *Vilas*, *supra*, was distinguished on the ground that the suit against the Postmaster General had asserted a common law—and not a constitutional—cause of action. See *Butz*, *supra*, 438 U. S., at 493–495.

federal officials have a right to absolute immunity from constitutional damage actions. Concluding that a blanket recognition of absolute immunity would be anomalous in light of the qualified immunity standard applied to state executive officials, 438 U. S., at 504, we held that federal officials generally have the same qualified immunity possessed by state officials in cases under § 1983. In so doing we reaffirmed our holdings that some officials, notably judges and prosecutors, "because of the special nature of their responsibilities," *id.*, at 511, "require a full exemption from liability." *Id.*, at 508. In *Butz* itself we upheld a claim of absolute immunity for administrative officials engaged in functions analogous to those of judges and prosecutors. *Ibid.* We also left open the question whether other federal officials could show that "public policy requires an exemption of that scope." *Id.*, at 506.

B

Our decisions concerning the immunity of government officials from civil damage liability arguably have not defined a straight line of doctrinal development. Nonetheless, a consistent approach has run throughout. In addressing claims of entitlement to immunity, this Court has recognized that "the law of privilege as a defense to damage actions against officers of Government has 'in large part been of judicial making,'" *Butz* v. *Economou*, *supra*, 438 U. S., at 501–502, quoting *Barr* v. *Matteo*, 360 U. S. 564, 569 (1959); *Doe* v. *McMillan*, 412 U. S. 306, 318 (1973), and that the "federal courts are . . . competent to determine the appropriate level of immunity" of state and federal officials, *Butz* v. *Economou*, *supra*, 438 U. S., at 503. Our decisions of course have been guided by federal statutes and the Constitution. Our cases under § 1983 formally have involved statutory construction. See, *e. g.*, *Tenney* v. *Brandhove*, 341 U. S. 367 (1951). Other decisions rest either on the literal text of the Constitution, *e. g.*, *Powell* v. *McCormack*, 395 U. S. 486, 506 (1969) (recognizing immunity of Congressmen under Speech and Debate Clause),

or on inferences of purpose drawn from constitutional language and structure, *e. g.*, *Gravel* v. *United States*, 408 U. S. 606, 618 (1972) (extending congressional immunity to a congressional aide, in order to "implement [the] fundamental purpose" of the Speech and Debate Clause). Cf. *Butz* v. *Economou*, *supra*, 438 U. S., at 508–517. Nonetheless, at least in the absence of explicit guidance from the Congress, in deciding immunity questions we have relied explicitly on consideration of public policy comparable to those traditionally recognized by courts at common law.[26] We also have examined the scope of the immunity historically afforded to particular officials at common law. See *Butz* v. *Economou*, *supra*, 438 U. S., at 508; *Imbler* v. *Pachtman*, 424 U. S. 409, 421 (1976).

This case now presents the claim that the President of the United States is shielded by absolute immunity from civil damages liability. In the case of the President the historical and policy inquiries tend to converge. Because the Presidency did not exist through most of the development of common law, any historical analysis must draw its evidence primarily from our constitutional structure and heritage. From both sources the relevant evidence involves an ongoing effort to identify the appropriate separation of powers among the branches of government—a concern that also forms the core of our inquiry involving those considerations of "public policy and convenience" traditionally weighed by courts at common law.

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[26] At least three basic rationales support immunity for public officials. First, competent and responsible individuals may be deterred from entering public service in the first place. Second, the prospect of damages liability may render officials unduly cautious in the discharge of their public responsibilities. See *Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (CA2 1949), cert. denied, 339 U. S. 949 (1950). Third, public servants may be distracted from their duties by the need to defend frequent lawsuits. See generally Freed, Executive Official Immunity for Constitutional Violations: An Analysis and a Critique, 72 Nw. L. Rev. 526, 529–530 (1977).

IV

Here a former President asserts his immunity from civil damage claims of two kinds. He stands named as a defendant in a direct action under the Constitution and two statutory actions under federal laws of general applicability. In neither case has Congress taken express legislative action to subject the President to civil liability for his official acts.[27]

Applying the principles of our cases to claims of this kind, we hold that petitioner, as a former President of the United States, is entitled to absolute immunity from damages liability predicated on his official acts. We consider this immunity a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and justified by considerations of public policy.

A

The President occupies a unique position in the constitutional scheme. Article II of the Constitution provides that "The executive Power shall be vested in a President of the United States. . . ." This grant of authority establishes the President as the chief constitutional officer of the Executive branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity. These include the enforcement of federal law—it is the President who is charged constitutionally to "take care that the laws be faithfully executed";[28] the conduct of foreign affairs—a realm in which the Court has recognized that "It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on in-

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[27] We know of no instance in the history of our country in which Congress has given serious consideration to imposing civil damage suit liability on a President. A congressional attempt to do so would present a serious constitutional issue that we have no occasion to consider in this case.

[28] U. S. Const., Art II, §3.

formation properly held secret";[29] and management of the personnel of the Executive branch—a task for which "imperative reasons requir[e] an unrestricted power [in the President] to remove the most important of his subordinates in their most important duties."[30]

In arguing that the President is entitled only to qualified immunity,[31] the respondent relies on cases in which we have recognized immunity of this scope for governors and cabinet officers. *E. g., Butz* v. *Economou*, *supra*; *Scheuer* v. *Rhodes*, *supra*. We find these cases to be inapposite. The President's unique status under the Constitution distinguishes him from other executive officials.[32]

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[29] *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U. S. 103, 111 (1948).

[30] *Myers* v. *United States*, 272 U. S. 52, 134–135 (1926).

[31] Under the "good faith" standard, as it has been formulated in such cases as *Wood* v. *Strickland*, 420 U. S. 308, 322 (1975), an official would be held immune from damages liability unless "he knew or reasonably should have known that the action he took within his sphere of official responsibility" was unconstitutional or "he took the action with malicious intention to cause a deprivation of constitutional rights or other injury. . . ."

[32] Noting that the "Speech and Debate Clause" provides a textual basis for congressional immunity, respondent argues that the Framers must be assumed to have rejected any similar grant of Executive immunity. Petitioner, on the other hand, offers historical arguments that the Framers affirmatively assumed Presidential immunity to have been established by the adoption of the constitutional scheme. Although we need not embrace petitioner's argument in order to decide this case, we do reject respondent's contention that the constitutional text and structure somehow prohibit a judicial recognition of absolute immunity. There are two difficulties with respondent's argument. First, a specific textual basis has not been considered a prerequisite to the recognition of immunity. No provision expressly confers judicial immunity. Yet the immunity of judges is well settled. See, *e. g., Bradley* v. *Fisher*, 13 Wall 335 (1872); *Stump* v. *Sparkman*, *supra*. Second, this Court already has established that absolute immunity may be extended to certain officials of the Executive Branch. *Butz* v. *Economou*, *supra*, 438 U. S., at 511–512; see *Imbler* v. *Pachtman*, *supra* (extending immunity to prosecutorial officials within the Executive branch).

Similarly, the importance and scope of the President's powers and duties render him particularly vulnerable to suits for civil damages.[33] In view of the special prominence of his office and the effect of his actions on countless people, the President would be an easily identifiable target of damage actions by disgruntled citizens.[34] The matters with which a President must concern himself are likely to "arouse the most intense feelings." *Pierson* v. *Ray*, *supra*, 386 U. S., at 554. Yet it is precisely in such cases that there exists the greatest public interest in providing the President "the maximum ability to deal fearlessly and impartially with" the duties of his office. *Ferri* v. *Ackerman*, 444 U. S. 193, 203 (1979) (footnote omitted). For example, it would be intolerable to instill in the President a hesitancy to remove inefficient or even disloyal personnel. Exposure of the President to damages actions also could distort the process of decisionmaking at the highest levels of the executive branch. Anticipating lawsuits against the President, the President and his advisers naturally would have an incentive to devote scarce energy, not to performance of their public duties, but to compilation of a record insulating the President from subsequent liability. In view of the singular importance of the President's duties, the threatened diversion of his energies by private lawsuits would raise unique risks to public policy.[35]

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[33] Cf. J. Story, Commentaries on the Constitution of the United States, § 1563, at 418–419 (1833 ed.):

"There are . . . incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions, which are confided to it. Among these, must necessarily be included the power to perform them . . . . The president cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability."

[34] These dangers are significant even though there is no historical record of numerous suits against the President, since a right to sue federal officials for damages for constitutional violations was not even recognized until *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971).

[35] Even in the case of officials possessing absolute immunity, this Court generally has held that this immunity extends only to acts in performance

B

In deference to the President's singular constitutional mandate, the courts traditionally have asserted their jurisdiction over him with respectful caution and restraint. This Court

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of particular functions. See *Butz* v. *Economou*, *supra*, 438 U. S., at 508–517; cf. *Imbler* v. *Pachtman*, *supra*, 424 U. S., at 430–431. In the case of the President, however, powerful reasons counsel rejection of a selective approach.

Under the Constitution and laws of the United States the President has discretionary responsibilities in a broad variety of areas, many of which are highly sensitive. In many cases it would be difficult to determine which Presidential "function" encompassed a particular action. Thus, in order to administer functional distinctions among Presidential actions, judges frequently would need to inquire into the *purpose* for which acts were taken. Inquiries of this kind could be highly intrusive.

In determining the proper scope of an absolute privilege, this Court repeatedly has refused to draw lines finer than history and reason would support. See, *e. g.*, *Spalding* v. *Vilas*, *supra*, 161 U. S., at 498 (privilege extends to all matters "committed by law to [an official's] control or supervision"); *Barr* v. *Matteo*, *supra*, 360 U. S., at 575 (fact "that the action here taken was within the outer perimeter of petitioner's line of duty is enough to render the privilege applicable. . . ."); *Stump* v. *Sparkman*, *supra*, 435 U. S., at 363 and n. 12 (judicial privilege applies even to acts occurring outside "the normal attributes of a judicial proceeding"). In view of the special nature of the President's constitutional office, we think it appropriate to extend to him absolute immunity from damage actions based on acts within the "outer perimeter" of the area of his official responsibility.

In this case respondent argues that petitioner Nixon would have acted outside the perimeter of his duties by ordering the discharge of respondent Fitzgerald, who was lawfully entitled to retain his job in the absence of "such cause as will promote the efficiency of the service." Brief for Respondent, at 39, citing 5 U. S. C. § 7512(a). Because Congress has granted this legislative protection, respondent argues, no federal official could, within his authority, cause Fitzgerald to be dismissed without satisfying this standard of proof in prescribed statutory proceedings.

This construction of the President's authority would subject him to trial on every allegation that an allegedly tortious action was taken for a forbidden purpose. Adoption of this construction thus would deprive absolute immunity of its intended effect.

It clearly is within the President's authority to "prescribe" the manner in

never has held that courts may compel the President to perform even ministerial functions.[36] By contrast, injunctions compelling action by other officials long have been upheld.[37] A similar distinction is reflected in the approach of this Court

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which the Secretary will "conduct the business" of the Air Force. 10 U. S. C. § 8012(b). Because this mandate includes the authority to prescribe reorganizations and reductions in force, petitioner's alleged wrongful acts lay well within the outer perimeter of his authority.

[36] Although this issue has not been faced squarely by the Court, there have been strong statements in previous opinions asserting the immunity of the President from judicial orders. In *Mississippi* v. *Johnson*, 71 U. S. 475, 501 (1866), the Court stated: "we are fully satisfied that this court has no jurisidiction of a bill to enjoin the President in the performance of his official duties; and that no such bill ought to be received by us." And in *Kendall* v. *United States*, 12 Pet. 524, 610 (1838), it is stated: "The executive power is vested in a President; and as far as his powers are derived from the consitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeaching power."

Strong historical considerations support the traditional judicial reluctance to enjoin action by the President. At the time of the first Congress, Vice President John Adams and Oliver Ellsworth, Senator from Connecticut, were reported as stating that "the President, personally, was not subject to any process whatever; could have no action whatever brought against him; and above the power of all judges, justices, etc." since otherwise a court could "stop the whole machine of Government." 167 W. Maclay, Journal of W. Maclay (E. Maclay ed. 1890). Justice Story offered a similar argument somewhat later. See 3 J. Story, Commentaries on the Constitution of the United States § 1563, at 418–419 (1st ed. 1888).

It also is clear that Thomas Jefferson believed the President not to be subject to judicial process. When Chief Justice Marshall held in *United States* v. *Burr*, 25 Fed. Cas. 30 (1807), that a subpoena duces tecum can be issued to a President, Jefferson protested strongly, and stated his broader view of the proper relationship between the Judiciary and the President:

"The leading principle of our Constitution is the independence of the Legislature, executive and judiciary of each other, and none are more jealous of this than the judiciary. But would the executive be independent of the judiciary, if he were subject to the *commands* of the latter, & to imprisonment for disobedience; if the several courts could handy him from pillar to post, keep him constantly trudging from north to south & east to west, and withdraw him entirely from his constitutional duties? The intention of the Constitution, that each branch should be independent of the

to cases in which various officials have claimed an evidentiary privilege. The courts generally have looked to the common law to determine the scope of an official's privilege.[38] In considering claims by the President, however, we have recognized that Presidential immunity is "rooted in the separation of powers under the Constitution." *United States* v. *Nixon*, 418 U. S. 683, 708 (1974).

It is settled law that the separation of powers doctrine does not bar every exercise of jurisdiction over the President of the United States. See, *e. g.*, *United States* v. *Nixon*, *supra*; *United States* v. *Burr*, 25 Fed. Cases 191, 196 (1807); cf. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952).[39] But our cases also have recognized that a court, before exercising jurisdiction, must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the executive branch.[40] When judicial action is needed to serve broad public interests—as when the Court acts, not in derogation of the separation of powers, but to maintain their proper balance,

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others, is further manifested by the means it has furnished to each, to protect itself from enterprises of force attempted on them by the others, and to none has it given more effectual or diversified means than to the executive." 10 The Works of Thomas Jefferson 404n. (P. Ford ed. 1905) (quoting a letter from President Jefferson to a prosecutor at the Burr trial) (emphasis in the original). See also 5 D. Malone, Jefferson and His Time: Jefferson the President 320–325 (1974).

[37] See *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952) (injunction directed to Secretary of Commerce); *Kendall* v. *United States*, *supra* (mandamus to enforce ministerial duty of the Postmaster General).

[38] See *United States* v. *Reynolds*, 345 U. S. 1, 6–7 (1953) (Secretary of the Air Force); *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 323–324 (DDC 1966), aff'd, 384 F. 2d 979 (CADC), cert denied, 389 U. S. 952 (1967) (Department of Justice officials).

[39] Although the President was not a party, the Court enjoined the Secretary of Commerce from executing a direct presidential order. See 343 U. S., at 583.

[40] See *Nixon* v. *General Services Administration*, 433 U. S. 425, 439 (1977); *United States* v. *Nixon*, 418 U. S. 683 (1974).

cf. *Youngstown Sheet & Tube Co.* v. *Sawyer*, *supra*—the exercise of jurisdiction has been held warranted. In the case of this merely private suit for damages based on a President's official acts, we hold it is not.[41]

V

A rule of absolute immunity for the President will not leave the Nation without sufficient protection against misconduct on the part of the chief executive.[42] There remains the constitutional remedy of impeachment.[43] In addition, there are

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[41] It never has been denied that absolute immunity may impose a serious cost on the individuals whose rights have been violated. As Judge Learned Hand wrote in *Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (CA2 1949), cert denied, 339 U. S. 949 (1950):

"It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for . . . [denying recovery] is that it is impossible to know whether the claim is well founded until the case has been tried, and to submit all officials, the innocent as well as the guilty, to the burden of trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute. . . . As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative."

In weighing the balance of advantages, this Court has found that there is a lesser public interest in actions for civil damages than, for example, in criminal prosecutions. See *United States* v. *Gillock*, 445 U. S. 360, 371–373 (1980); cf. *United States* v. *Nixon*, *supra*, 418 U. S., at 711–712 and n. 19 (basing holding on special importance of evidence in a criminal trial and distinguishing civil actions as raising different questions not presented for decision).

[42] The presence of alternative remedies has played an important role in our previous decisions in the area of official immunity. *E. g.*, *Imbler* v. *Pachtman*, *supra*, 424 U. S., at 428–429 ("We emphasize that the immunity of prosecutors from liability in suits under § 1983 does not leave the public powerless to deter misconduct or to punish that which occurs.").

[43] The same remedy plays a central role with respect to the misconduct of federal judges, who also possess absolute immunity. See Kaufman, Chilling Judicial Independence, 88 Yale L.J. 681, 690–706 (1979). Congressmen may be removed from office by a vote of their colleagues. U. S.

formal and informal checks on Presidential action that do not apply with equal force to other executive officials. The President is subjected to constant scrutiny by the press. Vigilant oversight by Congress also may serve to deter Presidential abuses of office, as well as to make credible the threat of impeachment.[44] Other incentives to avoid misconduct may include a desire to earn re-election, the need to maintain prestige as an element of Presidential influence, and a President's traditional concern for his historical stature.

The existence of alternative remedies and deterrents establishes that absolute immunity will not place the President "above the law." For the President, as for judges and prosecutors, absolute immunity merely precludes a particular private remedy for alleged misconduct in order to advance compelling public ends.

VI

For the reasons stated in this opinion, the decision of the Court of Appeals is reversed and the case remanded for action consistent with this opinion.

So ordered.

Const., Art. I, § 5, cl. 2.

[44] Prior to petitioner Nixon's resignation from office, the House Judiciary Committee had convened impeachment hearings. See generally Report of the Committee on the Judiciary of the House of Representatives: Impeachment of Richard M. Nixon President of the United States, H.R. Rep. No. 93–1305 (1974).

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To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79–1738

RICHARD NIXON, PETITIONER, *v.*
A. ERNEST FITZGERALD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[March —, 1982]

JUSTICE POWELL delivered the opinion of the Court.

The plaintiff in this lawsuit seeks relief in civil damages from a former President of the United States. The claim rests on actions allegedly taken during the former President's tenure in office. The issue before us is the scope of the immunity possessed by the President of the United States.

I

In January 1970 the respondent A. Ernest Fitzgerald lost his job as a management analyst with the Department of the Air Force. Fitzgerald's dismissal occurred in the context of a departmental reorganization and reduction in force, in which his job was eliminated. In announcing the reorganization, the Air Force characterized the action as taken to promote economy and efficiency in the armed forces.

Respondent's discharge attracted unusual attention in Congress and in the press. Fitzgerald had attained national prominence approximately one year earlier, during the waning months of the presidency of Lyndon B. Johnson. On November 13, 1968, Fitzgerald appeared before the Subcommittee on Economy in Government of the Joint Economic Committee of the United States Congress. To the apparent embarrassment of his superiors in the Department of Defense, Fitzgerald testified that cost-overruns on the C–5A

transport plane could approximate $2 billion.[1] He also revealed that unexpected technical difficulties had arisen during the development of the aircraft.

Concerned that Fitzgerald might have suffered retaliation for his congressional testimony, the Subcommittee on Economy in Government convened public hearings on Fitzgerald's dismissal.[2] The press reported those hearings prominently, as it had the earlier announcement that his job was being eliminated by the Department of Defense. At a news conference on December 8, 1969, President Richard Nixon was queried about Fitzgerald's impending separation from government service.[3] The President responded by promising to

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[1] See *Economics of Military Procurement: Hearings Before the Subcommittee on Economy in Government of the Joint Economic Comm.*, 90th Cong., 2d Sess., Part I, at 199–201 (1968–1969). It is not disputed that officials in the Department of Defense were both embarrassed and angered by Fitzgerald's testimony. Within less than two months of respondent's congressional appearance, staff had prepared a memorandum for the outgoing Secretary of the Air Force, Harold Brown, listing three ways in which Fitzgerald might be removed from his position. See App. 209–211 (Memorandum of John Lang to Harold Brown, Jan. 6, 1969). Among these was a "reduction in force"—the means by which Fitzgerald ultimately was removed by Brown's successor in office under the new Nixon administration. The reduction in force was announced publicly on November 4, 1969, and Fitzgerald accordingly was separated from the Air Force upon the elimination of his job on January 5, 1970.

[2] See *The Dismissal of A. Ernest Fitzgerald by the Department of Defense: Hearings Before the Subcomm. on Economy in Government of the Joint Economic Comm.*, 91st Cong., 1st Sess. (1969). Some 60 Members of Congress also signed a letter to the President protesting the "firing of this dedicated public servant" as a "punitive action." *Id.*, at 115–116, App., at 177–179.

[3] A briefing memorandum on the Fitzgerald matter had been prepared by White House staff in anticipation of a possible inquiry at the forthcoming press conference. Authored by aide Patrick Buchanan, it advanced the view that the Air Force was "firing . . . a good public servant." App. 269 (Memorandum of Patrick Buchanan to Richard Nixon, December 5, 1969). The memorandum suggested that the President order Fitzgerald's retention by the Defense Department.

look into the matter.[4] Shortly after the news conference the petitioner asked White House Chief of Staff H.R. Haldeman to arrange for Fitzgerald's assignment to another job within the Administration.[5] It also appears that the President suggested to Budget Director Robert Mayo that Fitzgerald might be offered a position in the Bureau of the Budget.[6]

Fitzgerald's proposed reassignment encountered resistance within the Administration.[7] In an internal memorandum of January 20, 1970, White House aide Alexander Butterfield reported to Haldeman that "Fitzgerald is no doubt a top-notch cost expert, but he must be given very low marks in loyalty; and after all, loyalty is the name of the game."[8] Butterfield therefore recommended that "We should let him bleed, for a while at least."[9] There is no evi-

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[4] App. 228.

[5] See App. 109–112 (Deposition of H.R. Haldeman); App. 137–141 (Deposition of petitioner Richard Nixon). Haldeman's deposed testimony was based on his handwritten notes of December 12, 1969. App. 275.

[6] See App. 126 (Deposition of Robert Mayo); App. 141 (Deposition of Richard Nixon).

[7] Both Mayo and his deputy, James Schlesinger, appear to have resisted at least partly due to a suspicion that Fitzgerald lacked institutional loyalty to Executive policies and that he spoke too freely in communications with friends on Capitol Hill. Both also stated that high level positions were presently unavailable within the Bureau of the Budget. See App. 126 (Deposition of Robert Mayo); App. 146–147 (Deposition of James Schlesinger).

[8] Quoted in *Decision on the Appeal of A. Ernest Fitzgerald* (*CSC Decision*), App., at 60, 84 (September 18, 1973).

[9] *Id.*, at 85. The memorandum added that "We owe 'first choice on Fitzgerald' to [Senator] Proxmire and others who tried so hard to make him a hero [for exposing the cost overruns]." Suspicion of Fitzgerald's assumed loyalty toward Senator Proxmire was widely shared in the White House and in the Defense Department. According to the *CSC Decision*, *supra*, App., at 83:

"While Mr. Fitzgerald has denied that he was 'Senator Proxmire's boy in the Air Force,' and he may honestly believe it, we find this statement difficult to accept. It is evident that the top officials in the Air Force, without specifically saying so, considered him to be just that. . . . We also note

dence of White House efforts to reemploy Fitzgerald subsequent to the Butterfield memorandum.

Absent any offer of alternative federal employment, Fitzgerald complained to the Civil Service Commission. In a letter of January 20, 1970, he alleged that his separation represented unlawful retaliation for his truthful testimony before a congressional committee.[10] The Commission convened a closed hearing on Fitzgerald's allegations on May 4, 1971. Fitzgerald, however, preferred to present his grievances in public. After he had brought suit and won an injunction, *Fitzgerald* v. *Hampton*, 467 F. 2d 755 (CADC 1972), public hearings commenced on January 26, 1973. The hearings again generated publicity, much of it devoted to the testimony of Air Force Secretary Robert Seamans. Although he denied that Fitzgerald had lost his position in retaliation for congressional testimony, Seamans testified that he had received "some advice" from the White House before Fitzgerald's job was abolished.[11] But the Secretary declined to be more specific. He responded to several questions by invoking "executive privilege."[12]

At a news conference on January 31, 1973, the President was asked about Mr. Seamans' testimony. Mr. Nixon took the opportunity to assume personal responsibility for Fitzgerald's dismissal:

> "I was totally aware that Mr. Fitzgerald would be fired or discharged or asked to resign. I approved it and Mr. Seamans must have been talking to someone who had discussed the matter with me. No, this was not a case of some person down the line deciding he

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that upon leaving the Air Force Mr. Fitzgerald was employed as a consultant by the Proxmire Committee and that Senator Proxmire appeared at the Commission hearing as a character witness for [Fitzgerald]."

[10] See *CSC Decision*, App., at 61.

[11] See *id.*, at 83–84.

[12] See *ibid.*

> should go. It was a decision that was submitted to me. I made it and I stick by it."[13]

A day later, however, the White House press office issued a retraction of the President's statement. According to a press spokesman, the President had confused Fitzgerald with another former executive employee. On behalf of the President, the spokesman asserted that Mr. Nixon had not had "put before him the decision regarding Mr. Fitzgerald."[14]

After hearing over 4,000 pages of testimony, the Chief Examiner for the Civil Service Commission issued his decision in the Fitzgerald case on September 18, 1973. *Decision on the Appeal of A. Ernest Fitzgerald*, App., at 60. The Examiner held that Fitzgerald's dismissal had offended applicable civil service regulations. App. 86–87.[15] The Examiner based this conclusion on a finding that the departmental reorganization in which Fitzgerald lost his job, though purportedly implemented as an economy measure, was in fact moti-

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[13] App. 185. A few hours after the press conference, Mr. Nixon repeated privately to Presidential aide Charles Colson that he had ordered Fitzgerald's firing. App. 214–215 (recorded conversation of Jan. 31, 1973).

[14] App. 196 (transcription of statement of White House press secretary Ronald Ziegler, Feb. 1, 1973). In a conversation with aide John Ehrlichman, following his conversation with Charles Colson, see *supra* note 13, the President again had claimed responsibility for Fitzgerald's dismissal. When Ehrlichman corrected him on several details, however, the President concluded that he was "thinkin' of another case." App. 218 (recorded conversation of Jan. 31, 1973). See *id.*, at 220. It was after this conversation that the retraction was ordered.

[15] Fitzgerald's position in the Air Force was in the "excepted service" and therefore not covered by civil service rules and regulations for the competitive service. *Fitzgerald* v. *Hampton*, 467 F. 2d 755, 758 (CADC 1972); see *CSC Decision*, App., at 63–64. In *Hampton*, however, the court held that Fitzgerald's employment nonetheless was under "legislative protection," since he was a "preference eligible" veteran entitled to various statutory protections under the Veterans Preference Act. See 467 F. 2d, at 758–768. Among these were the benefits of the reduction in force procedures established by civil service regulation. See 467 F. 2d, at 758.

vated by "reasons purely personal to" respondent. *Id.*, at 86. As this was an impermissible basis for a reduction in force,[16] the Examiner recommended Fitzgerald's reappointment to his old position or to a job of comparable authority.[17] The Examiner, however, explicitly distinguished this narrow conclusion from a suggested finding that Fitzgerald had suffered retaliation for his testimony to Congress. As found by the Commission, "the evidence in the record does not support [Fitzgerald's] allegation that his position was abolished and that he was separated . . . in retaliation for his having revealed the C–5A cost overrun in testimony before the Proxmire Committee on November 13, 1968." *Id.*, at 81.

Following the Commission's decision, Fitzgerald filed a suit for damages in the United States District Court. In it he raised essentially the same claims presented to the Civil Service Commission.[18] As defendants he named eight officials of the Defense Department, White House aide Alex-

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[16] The Examiner found that Fitzgerald in fact was dismissed because of his superiors' dissatisfaction with his job performance. *CSC Decision*, App., at 86–87. Their attitude was evidenced by "statements that he was not a 'team player' and 'not on the Air Force team.'" App. 88. Without deciding whether this would have been an adequate basis for an "adverse action" against Fitzgerald as an "inadequate or unsatisfactory employee," *id.*, at 86, the Examiner held that the Commission's adverse action procedures, current version codified at 5 CFR § 752, implicitly forbade the Air Force to employ a "reduction in force" as a means of dismissing respondent for reasons "personal to" him. App. 87.

[17] The Commission also ordered that Fitzgerald should receive back pay. *CSC Decision*, App., at 87–88. Despite the Commission's order, respondent avers that he "has still not obtained reinstatement to a position equivalent to his former one," Brief for Respondent, at 11, n. 17, and that he therefore has brought an enforcement action in the District Court.

[18] The complaint alleged a continuing conspiracy to deprive him of his job, to deny him reemployment, and to besmirch his reputation. Fitzgerald alleged that the conspiracy had continued through the Commission hearings and remained in existence at the initiation of the lawsuit. See *Fitzgerald* v. *Seamans*, 384 F. Supp. 688, 690–692 (DC 1974).

ander Butterfield, and "one or More" unnamed "White House Aides" styled only as "John Does."

The District Court dismissed the action under the District of Columbia's three-year statute of limitations, *Fitzgerald* v. *Seamans*, 384 F. Supp. 688 (D.D.C. 1974), and the Court of Appeals affirmed as to all but one defendant, White House aide Alexander Butterfield, *Fitzgerald* v. *Seamans*, 553 F. 2d 220 (CADC 1977). The Court of Appeals reasoned that Fitzgerald had no reason to suspect White House involvement in his dimissal at least until 1973. In that year, reasonable grounds for suspicion had arisen, most notably through publication of the internal White House memorandum in which Butterfield had recommended that Fitzgerald at least should be made to "bleed for a while" before being offered another job in the Administration. *Id.*, at 225, 229. Holding that concealment of illegal activity would toll the statute of limitations, the Court of Appeals remanded the action against Butterfield for further proceedings in the District Court.

Following the remand and extensive discovery thereafter, Fitzgerald filed a Second Amended Complaint in the District Court on July 5, 1978. It was in this amended complaint—more than eight years after he had complained of his discharge to the Civil Service Commission—that Fitzgerald first named the petitioner Nixon as a party defendant.[18] Also included as defendants were White House aide Bryce Harlow and other officials of the Nixon administration. Additional discovery ensued. By March 1980, only three defendants remained: the petitioner Richard Nixon and White House aides

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[18]The general allegations of the complaint remained essentially unchanged. In averring Nixon's participation in the alleged conspiracy against him, the complaint quoted petitioner's press conference statement that he was "totally aware" of and in fact "approved" Fitzgerald's dismissal. Second Amended Complaint, at 6.

Harlow and Butterfield. Denying a motion for summary judgment, the District Court ruled that the action must proceed to trial. Its order of March 26 held that Fitzgerald had stated triable causes of action under two federal statutes and the First Amendment to the Constitution.[20] The Court also ruled that petitioner was not entitled to claim absolute presidential immunity.

Petitioner took a collateral appeal of the immunity decision to the Court of Appeals for the District of Columbia Circuit. The Court of Appeals dismissed summarily. It apparently did so on the ground that its recent decision in *Halperin* v. *Kissinger*, 606 F. 2d 1192 (CADC 1979), aff'd by an equally

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[20] See Appendix to Petition for Certiorari, at 1a–2a. The District Court held that respondent was entitled to "infer" a cause of action under 5 U. S. C. § 7211 and 18 U. S. C. § 1505. Neither expressly confers a private right to sue for relief in damages. The first, 5 U. S. C. § 7211 (Supp. III 1979), provides generally that "The right of employees . . . to . . . furnish information to either House of Congress, or to a committee or a Member thereof, may not be interfered with or denied." The second, 18 U. S. C. § 1505, is a criminal statute making it a crime to obstruct congressional testimony. The correctness of the decision that a cause of action could be "implied" under these statutes is not currently before us. Neither is the question whether the courts, under the direct authority of the First Amendment, may recognize a private action against the President for relief in damages. Cf. *Carlson* v. *Green*, 446 U. S. 14, 19 (1980) (in direct constitutional actions against officials with "independent status in our constitutional scheme . . . judicially created remedies . . . might be inappropriate"); *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388, 396 (1971) (upholding judicial recognition of a nonstatutory damages remedy for Fourth Amendment violations in cases "involv[ing] no special factors counselling hesitation in the absence of affirmative action by Congress"). As explained *infra*, this case is here under the "collateral order" doctrine, for review of the District Court's denial of petitioner's motion to dismiss on the ground that he enjoyed absolute immunity from civil suit. The District Court also held that respondent had stated a claim under the common law of the District of Columbia, but respondent subsequently abandoned his common law cause of action. See Respondent's Supplemental Brief, at 2 (May 14, 1980).

divided vote, 452 U. S. 713 (1981), had rejected this claimed immunity defense.

As this Court has not ruled on the scope of immunity available to a President of the United States, we granted certiorari to decide this important issue. 452 U. S. 957 (1981).

II

Before addressing the merits of this case, we must consider two challenges to our jurisdiction. In his opposition to the petition for certiorari, respondent argued that this Court is without jurisdiction to review the non-final order in which the District Court rejected petitioner's claim to absolute immunity.[21] We also must consider an argument that an agreement between the parties has mooted the controversy.

A

Petitioner invokes the jurisdiction of this Court under 28 U. S. C. § 1254, a statute that invests us with authority to review "[c]ases in" the courts of appeals.[22] When the petitioner in this case sought review of an interlocutory order denying his claim to absolute immunity, the Court of Appeals dismissed the appeal for lack of jurisdiction. Emphasizing the "jurisdictional" basis for the Court of Appeals' decision, respondent argued that the District Court's order was not an appealable "case" properly "in" the Court of Appeals within the meaning of § 1254. We do not agree.

Under the "collateral order" doctrine of *Cohen* v. *Benefi-*

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[21] See Brief for Respondent in Opposition to the Petition for Certiorari, at 2. Although Fitzgerald has not continued to urge this argument, the challenge was jurisdictional, and we therefore address it.

[22] The statute provides in pertinent part:

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. . . .

28 U. S. C. § 1254.

cial Industrial Loan Corp., 337 U. S. 541 (1949), a small class of interlocutory orders are immediately appealable to the courts of appeals. As defined by *Cohen*, this class embraces orders that "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and [are] effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 468 (1978); see *Cohen*, *supra*, 337 U. S., at 546–547. As an additional requirement, *Cohen* established that a collateral appeal of an interlocutory order must "present[] a serious and unsettled question." 337 U. S., at 547. At least twice before this Court has held that orders denying claims of absolute immunity are appealable under the *Cohen* criteria. See *Helstoski* v. *Meanor*, 442 U. S. 500 (1979) (claim of immunity under the Speech and Debate Clause); *Abney* v. *United States*, 431 U. S. 651 (1977) (claim of immunity under Double Jeopardy Clause). In previous cases the Court of Appeals for the District of Columbia Circuit also has treated orders denying absolute immunity as appealable under *Cohen*. See *Briggs* v. *Goodwin*, 569 F. 2d 10, 58–60 (CADC 1977) (Wilkey, J., writing separately for the Court on the appealability issue); *McSurely* v. *McClellan*, 521 F. 2d 1024, 1032 (1975), aff'd in pertinent part en banc, 553 F. 2d 1277, 1283–1284 n. 18 (1976), cert dismissed *sub nom. McAdams* v. *McSurely*, 438 U. S. 189 (1978).

In "dismissing" the appeal in this case, the Court of Appeals appears to have reasoned that petitioner's appeal lay outside the *Cohen* doctrine because it raised no "serious and unsettled question" of law. This argument was pressed by the respondent, who asked the Court of Appeals to dismiss on the basis of that court's "controlling" decision in *Halperin* v. *Kissinger*, *supra*.

Under the circumstances of this case, we cannot agree that petitioner's interlocutory appeal failed to raise a "serious and unsettled" question. Although the Court of Appeals had ruled in *Halperin* v. *Kissinger* that the President was not en-

titled to absolute immunity, this Court had never so held. And a petition for certiorari in *Halperin* was pending in this Court at the time petitioner's appeal was dismissed. In light of the special solicitude due to claims alleging a threatened breach of essential presidential prerogatives under the separation of powers, see *United States* v. *Nixon*, 418 U. S. 683, 691–692 (1974), we conclude that petitioner did present a "serious and unsettled" and therefore appealable question to the Court of Appeals. It follows that the case was "in" the Court of Appeals under § 1254 and properly within our certiorari jurisdiction.[23]

B

Shortly after petitioner had filed his petition for ceriorari in this Court and respondent had entered his opposition, the parties reached an agreement to liquidate damages.[24] Under its terms the petitioner Nixon paid the respondent Fitzgerald a sum of $142,000. In consideration Fitzgerald agreed to ac-

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[23] There can be no serious doubt concerning our power to review a court of appeals' decision to dismiss for lack of jurisdiction—a power we have exercised routinely. See, *e. g.*, *Gardner* v. *Westinghouse Broadcasting Co.*, 437 U. S. 478 (1978). If we lacked authority to do so, decisions to dismiss for want of jurisdiction would be insulated entirely from review by this Court.

Nor, now that we have taken jurisdiction of the case, need we remand to the Court of Appeals for a decision on the merits. The immunity question is a pure issue of law, appropriate for our immediate resolution. Especially in light of the Court of Appeals' now-binding decision of the issue presented, concerns of judicial economy fully warrant our decision of the important question presented.

[24] Respondent filed a copy of this agreement with the Clerk of this Court on August 24, 1981, as an appendix to his Brief in Opposition to a Motion of Morton, Ina, David, Mark and Gary Halperin to Intervene and for Other Relief. On June 10, 1980, prior to the Court's action on the petition for certiorari, counsel to the parties had advised the Court that their clients had reached an agreement to liquidate damages, but that there remained a live controversy. Counsel did not include a copy of the agreement in their initial submission.

cept liquidated damages of $28,000 in the event of a ruling by this Court that petitioner was not entitled to absolute immunity. In case of a decision upholding petitioner's immunity claim, no further payments would be made.

The limited agreement between the parties left both petitioner and respondent with a considerable financial stake in the resolution of the question presented in this Court. As we recently concluded in a case involving a similar contract, "Given respondents' continued active pursuit of monetary relief, this case remains 'definite and concrete, touching the legal relations of parties having adverse legal interests.'" *Havens Realty Co.* v. *Coleman*, —— U. S. ——, —— (1982), quoting *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240–241 (1937).

III

A

This Court consistently has recognized that government officials are entitled to some form of immunity from suits for civil damages. In *Spalding* v. *Vilas*, 161 U. S. 483 (1896), the Court considered the immunity available to the Postmaster General in a suit for damages based upon his official acts. Drawing upon principles of immunity developed in English cases at common law, the Court concluded that "[t]he interests of the people" required a grant of absolute immunity to public officers. *Id.*, at 498. In the absence of immunity, the Court reasoned, executive officials would hesitate to exercise their discretion in a way "injuriously affect[ing] the claims of particular individuals," *id.*, at 499, even when the public interest required bold and unhesitating action. Considerations of "public policy and convenience" therefore compelled a judicial recognition of immunity from suits arising from official acts.

> "In exercising the functions of his office, the head of an Executive Department, keeping within the limits of his

> authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government, if he were subjected to any such restraint."

Id., at 498.

Decisions subsequent to *Spalding* have extended the defense of immunity to actions besides those at common law. In *Tenney* v. *Brandhove*, 341 U. S. 367 (1951), the Court considered whether the passage of 42 U. S. C. § 1983, which made no express provision for immunity for any official, had abrogated the privilege accorded to state legislators at common law. *Tenney* held that it had not. Examining § 1983 in light of the "presuppositions of our political history" and our heritage of legislative freedom, the Court found it incredible "that Congress . . . would impinge on a tradition so well grounded in history and reason" without some indication of intent more explicit than the general language of the statute. *Id.*, at 376. Similarly, the decision in *Pierson* v. *Ray*, 386 U. S. 547 (1967), involving a § 1983 suit against a state judge, recognized the continued validity of the absolute immunity of judges for acts within the judicial role. This was a doctrine "'not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.'" *Id.*, at 554, quoting, *Scott* v. *Stansfield*, L.R. 3 Ex. 220, 223 (1868). See *Bradley* v. *Fisher*, 13 Wall. 335 (1872). The Court in *Pierson* also held that police officers are entitled to a qualified immunity protecting them from suit when their official acts are performed in "good faith." *Id.*, at 557.

In *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974), the Court considered the immunity available to state executive officials in a

§ 1983 suit alleging the violation of constitutional rights. In that case we rejected the officials' claim to absolute immunity under the doctrine of *Spalding* v. *Vilas*, finding instead that state executive officials possessed a "good faith" immunity from § 1983 suits alleging constitutional violations. Balancing the purposes of § 1983 against the imperatives of public policy, the Court held that "in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based." 416 U. S., at 247.

As construed by subsequent cases, *Scheuer* established a two-tiered division of immunity defenses in § 1983 suits. To most executive officers *Scheuer* accorded qualified immunity. For them the scope of the defense varied in proportion to the nature of their official functions and the range of decisions that conceivably might be taken in "good faith". This "functional" approach also defined a second tier, however, at which the especially sensitive duties of certain officials—notably judges and prosecutors—required the continued recognition of absolute immunity. See, *e. g.*, *Imbler* v. *Pachtman*, 424 U. S. 409 (1976) (state prosecutors possess absolute immunity with respect to the initiation and pursuit of prosecutions); *Stump* v. *Sparkman*, 435 U. S. 349 (1978) (state judge possesses absolute immunity for all judicial acts).

This approach was reviewed in detail in *Butz* v. *Economou*, 438 U. S. 478 (1978), when we considered for the first time the kind of immunity possessed by *federal* executive officials who are sued for constitutional violations.[25] In *Butz* the Court rejected an argument, based on decisions involving federal officials charged with common law torts, that all high

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[25] *Spalding* v. *Vilas*, *supra*, was distinguished on the ground that the suit against the Postmaster General had asserted a common law—and not a constitutional—cause of action. See *Butz*, *supra*, 438 U. S., at 493–495.

federal officials have a right to absolute immunity from constitutional damage actions. Concluding that a blanket recognition of absolute immunity would be anomalous in light of the qualified immunity standard applied to state executive officials, 438 U. S., at 504, we held that federal officials generally have the same qualified immunity possessed by state officials in cases under § 1983. In so doing we reaffirmed our holdings that some officials, notably judges and prosecutors, "because of the special nature of their responsibilities," *id.*, at 511, "require a full exemption from liability." *Id.*, at 508. In *Butz* itself we upheld a claim of absolute immunity for administrative officials engaged in functions analogous to those of judges and prosecutors. *Ibid.* We also left open the question whether other federal officials could show that "public policy requires an exemption of that scope." *Id.*, at 506.

B

Our decisions concerning the immunity of government officials from civil damage liability arguably have not defined a straight line of doctrinal development. Nonetheless, a consistent approach has run throughout. In addressing claims of entitlement to immunity, this Court has recognized that "the law of privilege as a defense to damage actions against officers of Government has 'in large part been of judicial making,'" *Butz* v. *Economou*, *supra*, 438 U. S., at 501–502, quoting *Barr* v. *Matteo*, 360 U. S. 564, 569 (1959); *Doe* v. *McMillan*, 412 U. S. 306, 318 (1973), and that the "federal courts are . . . competent to determine the appropriate level of immunity" of state and federal officials, *Butz* v. *Economou*, *supra*, 438 U. S., at 503. Our decisions of course have been guided by federal statutes and the Constitution. Our cases under § 1983 formally have involved statutory construction. See, *e. g.*, *Tenney* v. *Brandhove*, 341 U. S. 367 (1951). Other decisions rest either on the literal text of the Constitution, *e. g.*, *Powell* v. *McCormack*, 395 U. S. 486, 506 (1969) (recognizing immunity of Congressmen under Speech and Debate Clause),

or on inferences of purpose drawn from constitutional language and structure, *e. g.*, *Gravel* v. *United States*, 408 U. S. 606, 618 (1972) (extending congressional immunity to a congressional aide, in order to "implement [the] fundamental purpose" of the Speech and Debate Clause). Cf. *Butz* v. *Economou*, *supra*, 438 U. S., at 508–517. Nonetheless, at least in the absence of explicit guidance from the Congress, in deciding immunity questions we have relied explicitly on consideration of public policy comparable to those traditionally recognized by courts at common law.[28] We also have examined the scope of the immunity historically afforded to particular officials at common law. See *Butz* v. *Economou*, *supra*, 438 U. S., at 508; *Imbler* v. *Pachtman*, 424 U. S. 409, 421 (1976).

This case now presents the claim that the President of the United States is shielded by absolute immunity from civil damages liability. In the case of the President the historical and policy inquiries tend to converge. Because the Presidency did not exist through most of the development of common law, any historical analysis must draw its evidence primarily from our constitutional structure and heritage. From both sources the relevant evidence involves an ongoing effort to identify the appropriate separation of powers among the branches of government—a concern that also forms the core of our inquiry involving those considerations of "public policy and convenience" traditionally weighed by courts at common law.

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[28] At least three basic rationales support immunity for public officials. First, competent and responsible individuals may be deterred from entering public service in the first place. Second, the prospect of damages liability may render officials unduly cautious in the discharge of their public responsibilities. See *Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (CA2 1949), cert. denied, 339 U. S. 949 (1950). Third, public servants may be distracted from their duties by the need to defend frequent lawsuits. See generally Freed, Executive Official Immunity for Constitutional Violations: An Analysis and a Critique, 72 Nw. L. Rev. 526, 529–530 (1977).

IV

Here a former President asserts his immunity from civil damage claims of two kinds. He stands named as a defendant in a direct action under the Constitution and two statutory actions under federal laws of general applicability. In neither case has Congress taken express legislative action to subject the President to civil liability for his official acts.[27]

Applying the principles of our cases to claims of this kind, we hold that petitioner, as a former President of the United States, is entitled to absolute immunity from damages liability predicated on his official acts. We consider this immunity a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and justified by considerations of public policy.

A

The President occupies a unique position in the constitutional scheme. Article II of the Constitution provides that "The executive Power shall be vested in a President of the United States. . . ." This grant of authority establishes the President as the chief constitutional officer of the Executive branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity. These include the enforcement of federal law—it is the President who is charged constitutionally to "take care that the laws be faithfully executed";[28] the conduct of foreign affairs—a realm in which the Court has recognized that "It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on in-

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[27] We know of no instance in the history of our country in which Congress has given serious consideration to imposing civil damage suit liability on a President. A congressional attempt to do so would present a serious constitutional issue that we have no occasion to consider in this case.

[28] U. S. Const., Art II, § 3.

formation properly held secret";[29] and management of the personnel of the Executive branch—a task for which "imperative reasons requir[e] an unrestricted power [in the President] to remove the most important of his subordinates in their most important duties."[30]

In arguing that the President is entitled only to qualified immunity,[31] the respondent relies on cases in which we have recognized immunity of this scope for governors and cabinet officers. *E. g.*, *Butz* v. *Economou*, *supra*; *Scheuer* v. *Rhodes*, *supra*. We find these cases to be inapposite. The President's unique status under the Constitution distinguishes him from other executive officials.[32]

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[29] *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U. S. 103, 111 (1948).

[30] *Myers* v. *United States*, 272 U. S. 52, 134–135 (1926).

[31] Under the "good faith" standard, as it has been formulated in such cases as *Wood* v. *Strickland*, 420 U. S. 308, 322 (1975), an official would be held immune from damages liability unless "he knew or reasonably should have known that the action he took within his sphere of official responsibility" was unconstitutional or "he took the action with malicious intention to cause a deprivation of constitutional rights or other injury. . . ."

[32] Noting that the "Speech and Debate Clause" provides a textual basis for congressional immunity, respondent argues that the Framers must be assumed to have rejected any similar grant of Executive immunity. Petitioner, on the other hand, offers historical arguments that the Framers affirmatively assumed Presidential immunity to have been established by the adoption of the constitutional scheme. Although we need not embrace petitioner's argument in order to decide this case, we do reject respondent's contention that the constitutional text and structure somehow prohibit a judicial recognition of absolute immunity. There are two difficulties with respondent's argument. First, a specific textual basis has not been considered a prerequisite to the recognition of immunity. No provision expressly confers judicial immunity. Yet the immunity of judges is well settled. See, *e. g.*, *Bradley* v. *Fisher*, 13 Wall 335 (1872); *Stump* v. *Sparkman*, *supra*. Second, this Court already has established that absolute immunity may be extended to certain officials of the Executive Branch. *Butz* v. *Economou*, *supra*, 438 U. S., at 511–512; see *Imbler* v. *Pachtman*, *supra* (extending immunity to prosecutorial officials within the Executive branch).

Similarly, the importance and scope of the President's powers and duties render him particularly vulnerable to suits for civil damages.[33] In view of the special prominence of his office and the effect of his actions on countless people, the President would be an easily identifiable target of damage actions by disgruntled citizens.[34] The matters with which a President must concern himself are likely to "arouse the most intense feelings." *Pierson* v. *Ray*, *supra*, 386 U. S., at 554. Yet it is precisely in such cases that there exists the greatest public interest in providing the President "the maximum ability to deal fearlessly and impartially with" the duties of his office. *Ferri* v. *Ackerman*, 444 U. S. 193, 203 (1979) (footnote omitted). For example, it would be intolerable to instill in the President a hesitancy to remove inefficient or even disloyal personnel. Exposure of the President to damages actions also could distort the process of decisionmaking at the highest levels of the executive branch. Anticipating lawsuits against the President, the President and his advisers naturally would have an incentive to devote scarce energy, not to performance of their public duties, but to compilation of a record insulating the President from subsequent liability. In view of the singular importance of the President's duties, the threatened diversion of his energies by private lawsuits would raise unique risks to public policy.[35]

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[33] Cf. J. Story, Commentaries on the Constitution of the United States, § 1563, at 418–419 (1833 ed.):

"There are . . . incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions, which are confided to it. Among these, must necessarily be included the power to perform them . . . . The president cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability."

[34] These dangers are significant even though there is no historical record of numerous suits against the President, since a right to sue federal officials for damages for constitutional violations was not even recognized until *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971).

[35] Even in the case of officials possessing absolute immunity, this Court generally has held that this immunity extends only to acts in performance

B

In deference to the President's singular constitutional mandate, the courts traditionally have asserted their jurisdiction over him with respectful caution and restraint. This Court

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of particular functions. See *Butz* v. *Economou*, *supra*, 438 U. S., at 508–517; cf. *Imbler* v. *Pachtman*, *supra*, 424 U. S., at 430–431. In the case of the President, however, powerful reasons counsel rejection of a selective approach.

Under the Constitution and laws of the United States the President has discretionary responsibilities in a broad variety of areas, many of which are highly sensitive. In many cases it would be difficult to determine which Presidential "function" encompassed a particular action. Thus, in order to administer functional distinctions among Presidential actions, judges frequently would need to inquire into the *purpose* for which acts were taken. Inquiries of this kind could be highly intrusive.

In determining the proper scope of an absolute privilege, this Court repeatedly has refused to draw lines finer than history and reason would support. See, *e. g.*, *Spalding* v. *Vilas*, *supra*, 161 U. S., at 498 (privilege extends to all matters "committed by law to [an official's] control or supervision"); *Barr* v. *Matteo*, *supra*, 360 U. S., at 575 (fact "that the action here taken was within the outer perimeter of petitioner's line of duty is enough to render the privilege applicable. . . ."); *Stump* v. *Sparkman*, *supra*, 435 U. S., at 363 and n. 12 (judicial privilege applies even to acts occurring outside "the normal attributes of a judicial proceeding"). In view of the special nature of the President's constitutional office, we think it appropriate to extend to him absolute immunity from damage actions based on acts within the "outer perimeter" of the area of his official responsibility.

In this case respondent argues that petitioner Nixon would have acted outside the perimeter of his duties by ordering the discharge of respondent Fitzgerald, who was lawfully entitled to retain his job in the absence of "such cause as will promote the efficiency of the service." Brief for Respondent, at 39, citing 5 U. S. C. § 7512(a). Because Congress has granted this legislative protection, respondent argues, no federal official could, within his authority, cause Fitzgerald to be dismissed without satisfying this standard of proof in prescribed statutory proceedings.

This construction of the President's authority would subject him to trial on every allegation that an allegedly tortious action was taken for a forbidden purpose. Adoption of this construction thus would deprive absolute immunity of its intended effect.

It clearly is within the President's authority to "prescribe" the manner in

never has held that courts may compel the President to perform even ministerial functions.[36] By contrast, injunctions compelling action by other officials long have been upheld.[37] A similar distinction is reflected in the approach of this Court

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which the Secretary will "conduct the business" of the Air Force. 10 U. S. C. § 8012(b). Because this mandate includes the authority to prescribe reorganizations and reductions in force, petitioner's alleged wrongful acts lay well within the outer perimeter of his authority.

[36] Although this issue has not been faced squarely by the Court, there have been strong statements in previous opinions asserting the immunity of the President from judicial orders. In *Mississippi* v. *Johnson*, 71 U. S. 475, 501 (1866), the Court stated: "we are fully satisfied that this court has no jurisidiction of a bill to enjoin the President in the performance of his official duties; and that no such bill ought to be received by us." And in *Kendall* v. *United States*, 12 Pet. 524, 610 (1838), it is stated: "The executive power is vested in a President; and as far as his powers are derived from the consitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeaching power."

Strong historical considerations support the traditional judicial reluctance to enjoin action by the President. At the time of the first Congress, Vice President John Adams and Oliver Ellsworth, Senator from Connecticut, were reported as stating that "the President, personally, was not subject to any process whatever; could have no action whatever brought against him; and above the power of all judges, justices, etc." since otherwise a court could "stop the whole machine of Government." 167 W. Maclay, Journal of W. Maclay (E. Maclay ed. 1890). Justice Story offered a similar argument somewhat later. See 3 J. Story, Commentaries on the Constitution of the United States § 1563, at 418–419 (1st ed. 1833).

It also is clear that Thomas Jefferson believed the President not to be subject to judicial process. When Chief Justice Marshall held in *United States* v. *Burr*, 25 Fed. Cas. 30 (1807), that a subpoena duces tecum can be issued to a President, Jefferson protested strongly, and stated his broader view of the proper relationship between the Judiciary and the President:

"The leading principle of our Constitution is the independence of the Legislature, executive and judiciary of each other, and none are more jealous of this than the judiciary. But would the executive be independent of the judiciary, if he were subject to the *commands* of the latter, & to imprisonment for disobedience: if the several courts could bandy him from pillar to post, keep him constantly trudging from north to south & east to west, and withdraw him entirely from his constitutional duties? The intention of the Constitution, that each branch should be independent of the

to cases in which various officials have claimed an evidentiary privilege. The courts generally have looked to the common law to determine the scope of an official's privilege.[38] In considering claims by the President, however, we have recognized that Presidential immunity is "rooted in the separation of powers under the Constitution." *United States* v. *Nixon*, 418 U. S. 683, 708 (1974).

It is settled law that the separation of powers doctrine does not bar every exercise of jurisdiction over the President of the United States. See, *e. g.*, *United States* v. *Nixon*, *supra*; *United States* v. *Burr*, 25 Fed. Cases 191, 196 (1807); cf. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952).[39] But our cases also have recognized that a court, before exercising jurisdiction, must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the executive branch.[40] When judicial action is needed to serve broad public interests—as when the Court acts, not in derogation of the separation of powers, but to maintain their proper balance,

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others, is further manifested by the means it has furnished to each, to protect itself from enterprises of force attempted on them by the others, and to none has it given more effectual or diversified means than to the executive." 10 The Works of Thomas Jefferson 404n. (P. Ford ed. 1905) (quoting a letter from President Jefferson to a prosecutor at the Burr trial) (emphasis in the original). See also 5 D. Malone, Jefferson and His Time: Jefferson the President 320–325 (1974).

[38] See *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952) (injunction directed to Secretary of Commerce); *Kendall* v. *United States*, *supra* (mandamus to enforce ministerial duty of the Postmaster General).

[39] See *United States* v. *Reynolds*, 345 U. S. 1, 6–7 (1953) (Secretary of the Air Force); *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 323–324 (DDC 1966), aff'd, 384 F. 2d 979 (CADC), cert denied, 389 U. S. 952 (1967) (Department of Justice officials).

[39] Although the President was not a party, the Court enjoined the Secretary of Commerce from executing a direct presidential order. See 343 U. S., at 588.

[40] See *Nixon* v. *General Services Administration*, 433 U. S. 425, 439 (1977); *United States* v. *Nixon*, 418 U. S. 683 (1974).

cf. *Youngstown Sheet & Tube Co.* v. *Sawyer*, *supra*—the exercise of jurisdiction has been held warranted. In the case of this merely private suit for damages based on a President's official acts, we hold it is not.[41]

V

A rule of absolute immunity for the President will not leave the Nation without sufficient protection against misconduct on the part of the chief executive.[42] There remains the constitutional remedy of impeachment.[43] In addition, there are

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[41] It never has been denied that absolute immunity may impose a serious cost on the individuals whose rights have been violated. As Judge Learned Hand wrote in *Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (CA2 1949), cert denied, 339 U. S. 949 (1950):

"It does indeed go without saying that an oficial, who is in fact guilty of using his powers to vent his spleen upon others, or for any personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for . . . [denying recovery] is that it is impossible to know whether the claim is well founded until the case has been tried, and to submit all officials, the innocent as well as the guilty, to the burden of trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute. . . . As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative."

In weighing the balance of advantages, this Court has found that there is a lesser public interest in actions for civil damages than, for example, in criminal prosecutions. See *United States* v. *Gillock*, 445 U. S. 360, 371–373 (1980); cf. *United States* v. *Nixon*, *supra*, 418 U. S., at 711–712 and n. 19 (basing holding on special importance of evidence in a criminal trial and distinguishing civil actions as raising different questions not presented for decision).

[42] The presence of alternative remedies has played an important role in our previous decisions in the area of official immunity. *E. g.*, *Imbler* v. *Pachtman*, *supra*, 424 U. S., at 428–429 ("We emphasize that the immunity of prosecutors from liability in suits under § 1983 does not leave the public powerless to deter misconduct or to punish that which occurs.").

[43] The same remedy plays a central role with respect to the misconduct of federal judges, who also possess absolute immunity. See Kaufman, Chilling Judicial Independence, 88 Yale L.J. 681, 690–706 (1979). Congressmen may be removed from office by a vote of their colleagues. U. S.

formal and informal checks on Presidential action that do not apply with equal force to other executive officials. The President is subjected to constant scrutiny by the press. Vigilant oversight by Congress also may serve to deter Presidential abuses of office, as well as to make credible the threat of impeachment.[44] Other incentives to avoid misconduct may include a desire to earn re-election, the need to maintain prestige as an element of Presidential influence, and a President's traditional concern for his historical stature.

The existence of alternative remedies and deterrents establishes that absolute immunity will not place the President "above the law." For the President, as for judges and prosecutors, absolute immunity merely precludes a particular private remedy for alleged misconduct in order to advance compelling public ends.

VI

For the reasons stated in this opinion, the decision of the Court of Appeals is reversed and the case remanded for action consistent with this opinion.

So ordered.

Const., Art. I, § 5, cl. 2.

[44] Prior to petitioner Nixon's resignation from office, the House Judiciary Committee had convened impeachment hearings. See generally Report of the Committee on the Judiciary of the House of Representatives: Impeachment of Richard M. Nixon President of the United States, H.R. Rep. No. 93–1305 (1974).

Stylistic changes throughout
1, 8, 15-26
Footnotes renumbered

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: (Only to Justices who voted with me)

Recirculated: ____

THIRD DRAFT
5/19

SUPREME COURT OF THE UNITED STATES

No. 79-1738

RICHARD NIXON, PETITIONER, *v.*
A. ERNEST FITZGERALD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[May ——, 1982]

Sandra objected to n 27, & other parts of opinion she previously had approved

JUSTICE POWELL delivered the opinion of the Court.

The plaintiff in this lawsuit seeks relief in civil damages from a former President of the United States. The claim rests on actions allegedly taken in the former President's official capacity during his tenure in office. The issue before us is the scope of the immunity possessed by the President of the United States.

I

In January 1970 the respondent A. Ernest Fitzgerald lost his job as a management analyst with the Department of the Air Force. Fitzgerald's dismissal occurred in the context of a departmental reorganization and reduction in force, in which his job was eliminated. In announcing the reorganization, the Air Force characterized the action as taken to promote economy and efficiency in the armed forces.

Not circulated

Respondent's discharge attracted unusual attention in Congress and in the press. Fitzgerald had attained national prominence approximately one year earlier, during the waning months of the presidency of Lyndon B. Johnson. On November 13, 1968, Fitzgerald appeared before the Subcommittee on Economy in Government of the Joint Economic Committee of the United States Congress. To the apparent embarrassment of his superiors in the Department of De-

fense, Fitzgerald testified that cost-overruns on the C–5A transport plane could approximate $2 billion.[1] He also revealed that unexpected technical difficulties had arisen during the development of the aircraft.

Concerned that Fitzgerald might have suffered retaliation for his congressional testimony, the Subcommittee on Economy in Government convened public hearings on Fitzgerald's dismissal.[2] The press reported those hearings prominently, as it had the earlier announcement that his job was being eliminated by the Department of Defense. At a news conference on December 8, 1969, President Richard Nixon was queried about Fitzgerald's impending separation from government service.[3] The President responded by promising to

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[1] See *Economics of Military Procurement: Hearings Before the Subcommittee on Economy in Government of the Joint Economic Comm.*, 90th Cong., 2d Sess., Part I, at 199–201 (1968–1969). It is not disputed that officials in the Department of Defense were both embarrassed and angered by Fitzgerald's testimony. Within less than two months of respondent's congressional appearance, staff had prepared a memorandum for the outgoing Secretary of the Air Force, Harold Brown, listing three ways in which Fitzgerald might be removed from his position. See App. 209–211 (Memorandum of John Lang to Harold Brown, Jan. 6, 1969). Among these was a "reduction in force"—the means by which Fitzgerald ultimately was removed by Brown's successor in office under the new Nixon administration. The reduction in force was announced publicly on November 4, 1969, and Fitzgerald accordingly was separated from the Air Force upon the elimination of his job on January 5, 1970.

[2] See *The Dismissal of A. Ernest Fitzgerald by the Department of Defense: Hearings Before the Subcomm. on Economy in Government of the Joint Economic Comm.*, 91st Cong., 1st Sess. (1969). Some 60 Members of Congress also signed a letter to the President protesting the "firing of this dedicated public servant" as a "punitive action." *Id.*, at 115–116.

[3] A briefing memorandum on the Fitzgerald matter had been prepared by White House staff in anticipation of a possible inquiry at the forthcoming press conference. Authored by aide Patrick Buchanan, it advanced the view that the Air Force was "firing . . . a good public servant." App. 269 (Memorandum of Patrick Buchanan to Richard Nixon, December 5, 1969). The memorandum suggested that the President order Fitzgerald's

look into the matter.[4] Shortly after the news conference the petitioner asked White House Chief of Staff H.R. Haldeman to arrange for Fitzgerald's assignment to another job within the Administration.[5] It also appears that the President suggested to Budget Director Robert Mayo that Fitzgerald might be offered a position in the Bureau of the Budget.[6]

Fitzgerald's proposed reassignment encountered resistance within the Administration.[7] In an internal memorandum of January 20, 1970, White House aide Alexander Butterfield reported to Haldeman that "Fitzgerald is no doubt a top-notch cost expert, but he must be given very low marks in loyalty; and after all, loyalty is the name of the game."[8] Butterfield therefore recommended that "We should let him bleed, for a while at least."[9] There is no evidence of White

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retention by the Defense Department.

[4] App. 228.

[5] See App. 109–112 (Deposition of H.R. Haldeman); App. 137–141 (Deposition of petitioner Richard Nixon). Haldeman's deposed testimony was based on his handwritten notes of December 12, 1969. App. 275.

[6] See App. 126 (Deposition of Robert Mayo); App. 141 (Deposition of Richard Nixon).

[7] Both Mayo and his deputy, James Schlesinger, appear to have resisted at least partly due to a suspicion that Fitzgerald lacked institutional loyalty to Executive policies and that he spoke too freely in communications with friends on Capitol Hill. Both also stated that high level positions were presently unavailable within the Bureau of the Budget. See App. 126 (Deposition of Robert Mayo); App. 146–147 (Deposition of James Schlesinger).

[8] Quoted in *Decision on the Appeal of A. Ernest Fitzgerald* (*CSC Decision*), reprinted in App., at 60, 84 (September 18, 1973). (Page citations to the *CSC Decision* refer to the cited page in the Joint Appendix).

[9] *Id.*, at 86. The memorandum added that "We owe 'first choice on Fitzgerald' to [Senator] Proxmire and others who tried so hard to make him a hero [for exposing the cost overruns]." Suspicion of Fitzgerald's assumed loyalty toward Senator Proxmire was widely shared in the White House and in the Defense Department. According to the *CSC Decision*, *supra*: "While Mr. Fitzgerald has denied that he was 'Senator Proxmire's boy in the Air Force,' and he may honestly believe it, we find this statement difficult to accept. It is evident that the top officials in the Air Force, without

House efforts to reemploy Fitzgerald subsequent to the Butterfield memorandum.

Absent any offer of alternative federal employment, Fitzgerald complained to the Civil Service Commission. In a letter of January 20, 1970, he alleged that his separation represented unlawful retaliation for his truthful testimony before a congressional committee.[10] The Commission convened a closed hearing on Fitzgerald's allegations on May 4, 1971. Fitzgerald, however, preferred to present his grievances in public. After he had brought suit and won an injunction, *Fitzgerald* v. *Hampton*, 467 F. 2d 755 (CADC 1972), public hearings commenced on January 26, 1973. The hearings again generated publicity, much of it devoted to the testimony of Air Force Secretary Robert Seamans. Although he denied that Fitzgerald had lost his position in retaliation for congressional testimony, Seamans testified that he had received "some advice" from the White House before Fitzgerald's job was abolished.[11] But the Secretary declined to be more specific. He responded to several questions by invoking "executive privilege."[12]

At a news conference on January 31, 1973, the President was asked about Mr. Seamans' testimony. Mr. Nixon took the opportunity to assume personal responsibility for Fitzgerald's dismissal:

> "I was totally aware that Mr. Fitzgerald would be fired or discharged or asked to resign. I approved it and Mr. Seamans must have been talking to someone who had discussed the matter with me. No, this was

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specifically saying so, considered him to be just that. . . . We also note that upon leaving the Air Force Mr. Fitzgerald was employed as a consultant by the Proxmire Committee and that Senator Proxmire appeared at the Commission hearing as a character witness for [Fitzgerald]." App. 83.

[10] *Id.*, at 61.

[11] See *id.*, at 83–84.

[12] See *ibid.*

> not a case of some person down the line deciding he should go. It was a decision that was submitted to me. I made it and I stick by it."[13]

A day later, however, the White House press office issued a retraction of the President's statement. According to a press spokesman, the President had confused Fitzgerald with another former executive employee. On behalf of the President, the spokesman asserted that Mr. Nixon had not had "put before him the decision regarding Mr. Fitzgerald."[14]

After hearing over 4,000 pages of testimony, the Chief Examiner for the Civil Service Commission issued his decision in the Fitzgerald case on September 18, 1973. *Decision on the Appeal of A. Ernest Fitzgerald*, as reprinted in App., at 60. The Examiner held that Fitzgerald's dismissal had offended applicable civil service regulations. App. 86–87.[15] The Examiner based this conclusion on a finding that the departmental reorganization in which Fitzgerald lost his job,

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[13] App. 185. A few hours after the press conference, Mr. Nixon repeated privately to Presidential aide Charles Colson that he had ordered Fitzgerald's firing. App. 214–215 (recorded conversation of Jan. 31, 1973).

[14] App. 196 (transcription of statement of White House press secretary Ronald Ziegler, Feb. 1, 1973). In a conversation with aide John Ehrlichman, following his conversation with Charles Colson, see *supra* note 13, the Pbesident again had claimed responsibility for Fitzgerald's dismissal. When Ehrlichman corrected him on several details, however, the President concluded that he was "thinkin' of another case." App. 218 (recorded conversation of Jan. 31, 1973). See *id.*, at 220. It was after this conversation that the retraction was ordered.

[15] Fitzgerald's position in the Air Force was in the "excepted service" and therefore not covered by civil service rules and regulations for the competitive service. *Fitzgerald* v. *Hampton*, 467 F. 2d 755, 758 (CADC 1972); see *CSC Decision*, App., at 63–64. In *Hampton*, however, the court held that Fitzgerald's employment nonetheless was under "legislative protection," since he was a "preference eligible" veteran entitled to various statutory protections under the Veterans Preference Act. See 467 F. 2d, at 758–768. Among these were the benefits of the reduction in force procedures established by civil service regulation. See 467 F. 2d, at 758.

though purportedly implemented as an economy measure, was in fact motivated by "reasons purely personal to" respondent. *Id.*, at 86. As this was an impermissible basis for a reduction in force,[16] the Examiner recommended Fitzgerald's reappointment to his old position or to a job of comparable authority.[17] The Examiner, however, explicitly distinguished this narrow conclusion from a suggested finding that Fitzgerald had suffered retaliation for his testimony to Congress. As found by the Commission, "the evidence in the record does not support [Fitzgerald's] allegation that his position was abolished and that he was separated . . . in retaliation for his having revealed the C–5A cost overrun in testimony before the Proxmire Committee on November 13, 1968." *Id.*, at 81.

Following the Commission's decision, Fitzgerald filed a suit for damages in the United States District Court. In it he raised essentially the same claims presented to the Civil Service Commission.[18] As defendants he named eight offi-

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[16] The Examiner found that Fitzgerald in fact was dismissed because of his superiors' dissatisfaction with his job performance. App. 86–87. Their attitude was evidenced by "statements that he was not a 'team player' and 'not on the Air Force team.'" App. 83. Without deciding whether this would have been an adequate basis for an "adverse action" against Fitzgerald as an "inadequate or unsatisfactory employee," *id.*, at 86, the Examiner held that the Commission's adverse action procedures, current version codified at 5 CFR § 752, implicitly forbade the Air Force to employ a "reduction in force" as a means of dismissing respondent for reasons "personal to" him. App. 87.

[17] The Commission also ordered that Fitzgerald should receive back pay. App. 87–88. Despite the Commission's order, respondent avers that he "has still not obtained reinstatement to a position equivalent to his former one," Brief for Respondent, at 11, n. 17, and that he therefore has brought an enforcement action in the District Court.

[18] The complaint alleged a continuing conspiracy to deprive him of his job, to deny him reemployment, and to besmirch his reputation. Fitzgerald alleged that the conspiracy had continued through the Commission hearings and remained in existence at the initiation of the lawsuit. See *Fitzgerald* v. *Seamans*, 384 F. Supp. 688, 690–692 (DC 1974).

cials of the Defense Department, White House aide Alexander Butterfield, and "one or More" unnamed "White House Aides" styled only as "John Does."

The District Court dismissed the action under the District of Columbia's three-year statute of limitations, *Fitzgerald* v. *Seamans*, 384 F. Supp. 688 (D.D.C. 1974), and the Court of Appeals affirmed as to all but one defendant, White House aide Alexander Butterfield, *Fitzgerald* v. *Seamans*, 553 F. 2d 220 (CADC 1977). The Court of Appeals reasoned that Fitzgerald had no reason to suspect White House involvement in his dimissal at least until 1973. In that year, reasonable grounds for suspicion had arisen, most notably through publication of the internal White House memorandum in which Butterfield had recommended that Fitzgerald at least should be made to "bleed for a while" before being offered another job in the Administration. *Id.*, at 225, 229. Holding that concealment of illegal activity would toll the statute of limitations, the Court of Appeals remanded the action against Butterfield for further proceedings in the District Court.

Following the remand and extensive discovery thereafter, Fitzgerald filed a Second Amended Complaint in the District Court on July 5, 1978. It was in this amended complaint—more than eight years after he had complained of his discharge to the Civil Service Commission—that Fitzgerald first named the petitioner Nixon as a party defendant.[19] Also included as defendants were White House aide Bryce Harlow and other officials of the Nixon administration. Additional discovery ensued. By March 1980, only three defendants remained: the petitioner Richard Nixon and White House aides

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[19]The general allegations of the complaint remained essentially unchanged. In averring Nixon's participation in the alleged conspiracy against him, the complaint quoted petitioner's press conference statement that he was "totally aware" of and in fact "approved" Fitzgerald's dismissal. Second Amended Complaint 6.

Harlow and Butterfield. Denying a motion for summary judgment, the District Court ruled that the action must proceed to trial. Its order of March 26 held that Fitzgerald had stated triable causes of action under two federal statutes and the First Amendment to the Constitution.[20] The Court also ruled that petitioner was not entitled to claim absolute presidential immunity.

Petitioner took a collateral appeal of the immunity decision to the Court of Appeals for the District of Columbia Circuit. The Court of Appeals dismissed summarily. It apparently did so on the ground that its recent decision in *Halperin* v. *Kissinger*, 606 F. 2d 1192 (CADC 1979), aff'd by an equally divided vote, 452 U. S. 713 (1981), had rejected this claimed immunity defense.

As this Court has not ruled on the scope of immunity available to a President of the United States, we granted certiorari to decide this important issue. 452 U. S. 957 (1981).

II

Before addressing the merits of this case, we must consider two challenges to our jurisdiction. In his opposition to

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[20] See Cert. App. 1–2. The District Court held that respondent was entitled to "infer" a cause of action under 5 U. S. C. § 7211 and 18 U. S. C. § 1505. Neither expressly confers a private right to sue for relief in damages. The first, 5 U. S. C. § 7211 (Supp. III 1979), provides generally that "The right of employees . . . to . . . furnish information to either House of Congress, or to a committee or a Member thereof, may not be interfered with or denied." The second, 18 U. S. C. § 1505, is a criminal statute making it a crime to obstruct congressional testimony. The correctness of the decision that a cause of action could be "implied" under these statutes is not currently before us. As explained *infra*, this case is here under the "collateral order" doctrine, for review of the District Court's denial of petitioner's motion to dismiss on the ground that he enjoyed absolute immunity from civil suit. The District Court also held that respondent had stated a claim under the common law of the District of Columbia, but respondent subsequently abandoned his common law cause of action. See Supplemental Brief for Respondent 2 (May 14, 1980).

omission

the petition for certiorari, respondent argued that this Court is without jurisdiction to review the non-final order in which the District Court rejected petitioner's claim to absolute immunity.[21] We also must consider an argument that an agreement between the parties has mooted the controversy.

A

Petitioner invokes the jurisdiction of this Court under 28 U. S. C. § 1254, a statute that invests us with authority to review "[c]ases in" the courts of appeals.[22] When the petitioner in this case sought review of an interlocutory order denying his claim to absolute immunity, the Court of Appeals dismissed the appeal for lack of jurisdiction. Emphasizing the "jurisdictional" basis for the Court of Appeals' decision, respondent argued that the District Court's order was not an appealable "case" properly "in" the Court of Appeals within the meaning of § 1254. We do not agree.

Under the "collateral order" doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949), a small class of interlocutory orders are immediately appealable to the courts of appeals. As defined by *Cohen*, this class embraces orders that "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and [are] effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 468 (1978); see *Cohen*, *supra*, 337 U. S., at 546–547. As an additional requirement,

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[21] See Brief for Respondent in Opposition 2. Although Fitzgerald has not continued to urge this argument, the challenge was jurisdictional, and we therefore address it.

[22] The statute provides in pertinent part:

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. . . .

28 U. S. C. § 1254.

Cohen established that a collateral appeal of an interlocutory order must "present[] a serious and unsettled question." 337 U. S., at 547. At least twice before this Court has held that orders denying claims of absolute immunity are appealable under the *Cohen* criteria. See *Helstoski* v. *Meanor*, 442 U. S. 500 (1979) (claim of immunity under the Speech and Debate Clause); *Abney* v. *United States*, 431 U. S. 651 (1977) (claim of immunity under Double Jeopardy Clause). In previous cases the Court of Appeals for the District of Columbia Circuit also has treated orders denying absolute immunity as appealable under *Cohen*. See *Briggs* v. *Goodwin*, 569 F. 2d 10, 58–60 (CADC 1977) (Wilkey, J., writing separately for the Court on the appealability issue); *McSurely* v. *McClellan*, 521 F. 2d 1024, 1032 (1975), aff'd in pertinent part en banc, 553 F. 2d 1277, 1283–1284 n. 18 (1976), cert dismissed *sub nom. McAdams* v. *McSurely*, 438 U. S. 189 (1978).

In "dismissing" the appeal in this case, the Court of Appeals appears to have reasoned that petitioner's appeal lay outside the *Cohen* doctrine because it raised no "serious and unsettled question" of law. This argument was pressed by the respondent, who asked the Court of Appeals to dismiss on the basis of that court's "controlling" decision in *Halperin* v. *Kissinger*, *supra*.

Under the circumstances of this case, we cannot agree that petitioner's interlocutory appeal failed to raise a "serious and unsettled" question. Although the Court of Appeals had ruled in *Halperin* v. *Kissinger* that the President was not entitled to absolute immunity, this Court had never so held. And a petition for certiorari in *Halperin* was pending in this Court at the time petitioner's appeal was dismissed. In light of the special solicitude due to claims alleging a threatened breach of essential presidential prerogatives under the separation of powers, see *United States* v. *Nixon*, 418 U. S. 683, 691–692 (1974), we conclude that petitioner did present a "serious and unsettled" and therefore appealable question to the Court of Appeals. It follows that the case was "in" the

Court of Appeals under § 1254 and properly within our certiorari jurisdiction.[23]

B

Shortly after petitioner had filed his petition for ceriorari in this Court and respondent had entered his opposition, the parties reached an agreement to liquidate damages.[24] Under its terms the petitioner Nixon paid the respondent Fitzgerald a sum of $142,000. In consideration Fitzgerald agreed to accept liquidated damages of $28,000 in the event of a ruling by this Court that petitioner was not entitled to absolute immunity. In case of a decision upholding petitioner's immunity claim, no further payments would be made.

The limited agreement between the parties left both petitioner and respondent with a considerable financial stake in the resolution of the question presented in this Court. As we recently concluded in a case involving a similar contract, "Given respondents' continued active pursuit of monetary re-

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[23] There can be no serious doubt concerning our power to review a court of appeals' decision to dismiss for lack of jurisdiction—a power we have exercised routinely. See, *e. g.*, *Gardner* v. *Westinghouse Broadcasting Co.*, 437 U. S. 478 (1978). If we lacked authority to do so, decisions to dismiss for want of jurisdiction would be insulated entirely from review by this Court.

Nor, now that we have taken jurisdiction of the case, need we remand to the Court of Appeals for a decision on the merits. The immunity question is a pure issue of law, appropriate for our immediate resolution. Especially in light of the Court of Appeals' now-binding decision of the issue presented, concerns of judicial economy fully warrant our decision of the important question presented.

[24] Respondent filed a copy of this agreement with the Clerk of this Court on August 24, 1981, as an appendix to his Brief in Opposition to a Motion of Morton, Ina, David, Mark and Gary Halperin to Intervene and for Other Relief. On June 10, 1980, prior to the Court's action on the petition for certiorari, counsel to the parties had advised the Court that their clients had reached an agreement to liquidate damages, but that there remained a live controversy. Counsel did not include a copy of the agreement in their initial submission.

lief, this case remains 'definite and concrete, touching the legal relations of parties having adverse legal interests.'" *Havens Realty Co.* v. *Coleman*, —— U. S. ——, —— (1982), quoting *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240–241 (1937).

III

A

This Court consistently has recognized that government officials are entitled to some form of immunity from suits for civil damages. In *Spalding* v. *Vilas*, 161 U. S. 483 (1896), the Court considered the immunity available to the Postmaster General in a suit for damages based upon his official acts. Drawing upon principles of immunity developed in English cases at common law, the Court concluded that "[t]he interests of the people" required a grant of absolute immunity to public officers. *Id.*, at 498. In the absence of immunity, the Court reasoned, executive officials would hesitate to exercise their discretion in a way "injuriously affect[ing] the claims of particular individuals," *id.*, at 499, even when the public interest required bold and unhesitating action. Considerations of "public policy and convenience" therefore compelled a judicial recognition of immunity from suits arising from official acts.

> "In exercising the functions of his office, the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government, if he were subjected to any such restraint."

Id., at 498.

Decisions subsequent to *Spalding* have extended the de-

fense of immunity to actions besides those at common law. In *Tenney* v. *Brandhove*, 341 U. S. 367 (1951), the Court considered whether the passage of 42 U. S. C. § 1983, which made no express provision for immunity for any official, had abrogated the privilege accorded to state legislators at common law. *Tenney* held that it had not. Examining § 1983 in light of the "presuppositions of our political history" and our heritage of legislative freedom, the Court found it incredible "that Congress . . . would impinge on a tradition so well grounded in history and reason" without some indication of intent more explicit than the general language of the statute. *Id.*, at 376. Similarly, the decision in *Pierson* v. *Ray*, 386 U. S. 547 (1967), involving a § 1983 suit against a state judge, recognized the continued validity of the absolute immunity of judges for acts within the judicial role. This was a doctrine "'not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.'" *Id.*, at 554, quoting, *Scott* v. *Stansfield*, L.R. 3 Ex. 220, 223 (1868). See *Bradley* v. *Fisher*, 13 Wall. 335 (1872). The Court in *Pierson* also held that police officers are entitled to a qualified immunity protecting them from suit when their official acts are performed in "good faith." *Id.*, at 557.

In *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974), the Court considered the immunity available to state executive officials in a § 1983 suit alleging the violation of constitutional rights. In that case we rejected the officials' claim to absolute immunity under the doctrine of *Spalding* v. *Vilas*, finding instead that state executive officials possessed a "good faith" immunity from § 1983 suits alleging constitutional violations. Balancing the purposes of § 1983 against the imperatives of public policy, the Court held that "in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circum-

stances as they reasonably appeared at the time of the action on which liability is sought to be based." 416 U. S., at 247.

As construed by subsequent cases, *Scheuer* established a two-tiered division of immunity defenses in § 1983 suits. To most executive officers *Scheuer* accorded qualified immunity. For them the scope of the defense varied in proportion to the nature of their official functions and the range of decisions that conceivably might be taken in "good faith". This "functional" approach also defined a second tier, however, at which the especially sensitive duties of certain officials—notably judges and prosecutors—required the continued recognition of absolute immunity. See, *e. g.*, *Imbler* v. *Pachtman*, 424 U. S. 409 (1976) (state prosecutors possess absolute immunity with respect to the initiation and pursuit of prosecutions); *Stump* v. *Sparkman*, 435 U. S. 349 (1978) (state judge possesses absolute immunity for all judicial acts).

This approach was reviewed in detail in *Butz* v. *Economou*, 438 U. S. 478 (1978), when we considered for the first time the kind of immunity possessed by *federal* executive officials who are sued for constitutional violations.[25] In *Butz* the Court rejected an argument, based on decisions involving federal officials charged with common law torts, that all high federal officials have a right to absolute immunity from constitutional damage actions. Concluding that a blanket recognition of absolute immunity would be anomalous in light of the qualified immunity standard applied to state executive officials, 438 U. S., at 504, we held that federal officials generally have the same qualified immunity possessed by state officials in cases under § 1983. In so doing we reaffirmed our holdings that some officials, notably judges and prosecutors, "because of the special nature of their responsibilities," *id.*, at 511, "require a full exemption from liability." *Id.*, at 508.

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[25] *Spalding* v. *Vilas*, *supra*, was distinguished on the ground that the suit against the Postmaster General had asserted a common law—and not a constitutional—cause of action. See *Butz*, *supra*, 438 U. S., at 493–495.

In *Butz* itself we upheld a claim of absolute immunity for administrative officials engaged in functions analogous to those of judges and prosecutors. *Ibid.* We also left open the question whether other federal officials could show that "public policy requires an exemption of that scope." *Id.*, at 506.

B

Our decisions concerning the immunity of government officials from civil damages liability have been guided by the Constitution, federal statutes, and history. Additionally, at least in the absence of explicit constitutional or congressional guidance, our immunity decisions have been informed by the common law. See *Butz* v. *Economou*, *supra*, at 508; *Imbler* v. *Pachtman*, 424 U. S. 409, 421 (1976). This Court necessarily also has weighed concerns of public policy, especially as illuminated by our history and the structure of our government. See, *e. g.*, *Butz* v. *Economou*, *supra*, at 508; *Imbler* v. *Pachtman*, *supra*, at 421; *Spalding* v. *Vilas*, *supra*, at 498.[25]

This case now presents the claim that the President of the United States is shielded by absolute immunity from civil damages liability. In the case of the President the inquiries into history and policy, though mandated independently by our cases, tend to converge. Because the Presidency did not exist through most of the development of common law, any historical analysis must draw its evidence primarily from our constitutional heritage and structure. Historical inquiry thus merges almost at its inception with the kind of "public policy" analysis appropriately undertaken by a federal court. This inquiry involves policies and principles that may be considered implicit in the nature of the President's office in a

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[25] Although the Court in *Butz* v. *Economou*, *supra*, at 508, described the requisite inquiry as one of "public policy," the focus of inquiry more accurately may be viewed in terms of the "inherent" or "structural" assumptions of our scheme of government.

system structured to achieve effective government under a constitutionally mandated separation of powers.

IV

Here a former President asserts his immunity from civil damage claims of two kinds. He stands named as a defendant in a direct action under the Constitution and two statutory actions under federal laws of general applicability. In neither case has Congress taken express legislative action to subject the President to civil liability for his official acts.[27]

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[27] The Court previously has suggested that separation-of-powers concerns might make it inappropriate for a court to "infer" a *Bivens* cause of action against an official of the President's constitutional stature. See *Carlson* v. *Green*, *supra*, at 19 (in direct constitutional actions against officials with independent status in our constitutional scheme . . . judicially created remedies . . . might be inappropriate"); *Bivens* v. *Six Unknown Federal Narcotics Agents*, *supra*, at 396 (inference of a constitutional damages remedy would be inappropriate in a case involving "special factors counselling hesitation in the absence of affirmative action by Congress").

Similar concerns, discussed in text *infra*, counsel hesitation in concluding that Congress intended a statute of general reference to subject the President to damages liability for his official acts. We know of no instance in which Congress explicitly has undertaken to expose the President to damages liability, and we have no occasion to consider the serious constitutional issues that would arise if Congress should do so.

Whether Congress intended a statute to create a damages remedy against the President is by definition a question of congressional intent. See *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, —— U. S. —— (1982); *Middlesex County Sewerage Auth.* v. *National Sea Clammers Assn.*, 453 U. S. 1 (1981); *California* v. *Sierra Club*, 451 U. S. 287 (1981). Reviewing this case under the "collateral order" doctrine, this Court must assume that causes of action may be inferred at least against some officials under 5 U. S. C. § 7211 and 18 U. S. C. § 1505. See note 20 *supra*. But it does not follow that we must—in interpreting a statute in light of immunity doctrine—infer an intent to impose damages liability on the President of the United States. Cf. *Tenney* v. *Brandhove*, 341 U. S. 367, 376 (1951) (construing a federal statute not to have imposed damages liability on legislators, for whom "history and reason" supported immunity from suit, "by covert inclusion in . . . general language").

Citing the purpose and legislative history of the two statutes in issue,

Applying the principles of our cases to claims of this kind, we hold that petitioner, as a former President of the United States, is entitled to absolute immunity from damages liability predicated on his official acts. We consider this immu-

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the dissenting opinion appears to argue that Congress did intend them to create a cause of action against the President. See *post*, at 20–21. The evidence, however, is overwhelmingly to the contrary. The pertinent legislative history principally involves the enactment of Section 6 of the Post Office Appropriations Act of 1912, ch. 389, 37 Stat. 539. The predecessor of 5 U. S. C. § 7211, this legislation was passed by Congress partly to override "gag rules" imposed by executive orders prior to that time. In terms, the statute provided that civil service employees had a right to report to Congress and that they should not be punished for doing so. Yet there is no indication on the face of the statute that Congress intended to impose damages liability on the President. And, in the historical context, it is implausible that Congress in 1912 could have intended to create a damages remedy against the President by mere implication. Only a few years earlier, in 1896, this Court had held that the Postmaster General was absolutely immune from civil suits arising from "action having more or less connection with the general matters committed by law to his control or supervision." *Spalding* v. *Vilas*, 161 U. S. 483, 498 (1896). The rationale of *Spalding*, see *id.*, at 498–499, would have applied to the President *a fortiori*. Because "our evaluation of congressional action . . . must take into account its contemporary legal context," *Cannon* v. *University of Chicago*, 441 U. S. 677, 698–699 (1979), any argument that Congress intended its general language to impose liability on the President must fail in the absence of further evidence. Nor does such support emerge from the legislative debates. On the contrary, these suggest that congressional oversight—not a remedy in damages from the President—would be the principal enforcement mechanism. See 48 Cong. Rec. 4654 (1912) ("Supervisory officials will hesitate to trump up charges . . . , as all cases of removals and reductions will be submitted to Congress each year, and if an employee can produce satisfactory evidence that he has not received the protection afforded in this bill his case can be made the subject of a special inquiry if Congress so decides.") (remarks of Rep. Calder); *id.*, at 4656 ("Men in official position will hesitate to trump up charges against an employee . . . , as all the cases of removals and reductions will be submitted to Congress each year. . . .") (Remarks of Rep. Reilly).

The other section from which respondent would infer a cause of action against the President is a criminal statute, 18 U. S. C. § 1505, originally enacted in 1940. It of course does not refer expressly to the President.

nity a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and consistent with our history. Justice Story's analysis remains generally persuasive:

> "There are . . . incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions, which are confided to it. Among these, must necessarily be included the power to perform them . . . . The president cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability." Cf. J. Story, Commentaries on the Constitution of the United States, § 1563, at 418–419 (1833 ed.):

A

The President occupies a unique position in the constitutional scheme. Article II of the Constitution provides that "[t]he executive Power shall be vested in a President of the United States. . . ." This grant of authority establishes the President as the chief constitutional officer of the Executive Branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity. These include the enforcement of federal law—it is the President who is charged constitutionally to "take care that the laws be faithfully executed";[28] the conduct of foreign affairs—a realm in which the Court has recognized that "[i]t would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on in-

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And even the respondent fails to argue that the legislative history suggests any intent to create a damages remedy enforceable against the President on the basis of his official acts.

[28] U. S. Const., Art II, § 3.

formation properly held secret";[29] and management of the Executive Branch—a task for which "imperative reasons requir[e] an unrestricted power [in the President] to remove the most important of his subordinates in their most important duties."[30]

In arguing that the President is entitled only to qualified immunity, the respondent relies on cases in which we have recognized immunity of this scope for governors and cabinet officers. *E. g.*, *Butz* v. *Economou*, *supra*; *Scheuer* v. *Rhodes*, *supra*. We find these cases to be inapposite. The President's unique status under the Constitution distinguishes him from other executive officials.[31]

Because of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government. As is the case with prosecutors and judges—for whom absolute immunity now is established—a President

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[29] *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U. S. 103, 111 (1948).

[30] *Myers* v. *United States*, 272 U. S. 52, 134–135 (1926).

[31] Noting that the "Speech and Debate Clause" provides a textual basis for congressional immunity, respondent argues that the Framers must be assumed to have rejected any similar grant of Executive immunity. Petitioner, on the other hand, offers historical arguments that the Framers affirmatively assumed Presidential immunity to have been established by the adoption of the constitutional scheme. Although we need not embrace petitioner's argument in order to decide this case, we do reject respondent's contention that the constitutional text and structure somehow prohibit a judicial recognition of absolute immunity. There are two difficulties with respondent's argument. First, a specific textual basis has not been considered a prerequisite to the recognition of immunity. No provision expressly confers judicial immunity. Yet the immunity of judges is well settled. See, *e. g.*, *Bradley* v. *Fisher*, 13 Wall 335 (1872); *Stump* v. *Sparkman*, *supra*. Second, this Court already has established that absolute immunity may be extended to certain officials of the Executive Branch. *Butz* v. *Economou*, *supra*, 438 U. S., at 511–512; see *Imbler* v. *Pachtman*, *supra* (extending immunity to prosecutorial officials within the Executive Branch).

1 footnote omitted

must concern himself with matters likely to "arouse the most intense feelings." *Pierson* v. *Ray*, *supra*, 386 U. S., at 554. Yet, as our decisions have recognized, it is in precisely such cases that there exists the greatest public interest in providing an official "the maximum ability to deal fearlessly and impartially with" the duties of his office. *Ferri* v. *Ackerman*, 444 U. S. 193, 203 (1979) (footnote omitted). This concern is compelling where the officeholder must make the most sensitive and far-reaching decisions entrusted to any official under our constitutional system.[32] Nor can the sheer prominence of the President's office be ignored. In view of the visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for suits for civil damages.[33] Cognizance of this personal vulnerability frequently could distract a President from his public duties, to the detriment not only of the President and his office but also the nation that the Presidency was designed to serve.[34]

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[32] Among the most powerful reasons supporting official immunity is the prospect that damages liability may render an official unduly cautious in the discharge of his official duties. As Judge Learned Hand wrote in *Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (CA2 1949), cert denied, 339 U. S. 949 (1950), "[t]he justification for . . . [denying recovery] is that it is impossible to know whether the claim is well founded until the case has been tried, and to submit all officials, the innocent as well as the guilty, to the burden of trial and the danger of its outcome would dampen the ardor of all but the most resolute . . . ."

[33] These dangers are significant even though there is no historical record of numerous suits against the President, since a right to sue federal officials for damages for constitutional violations was not even recognized until *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971).

[34] In defining the scope of an official's absolute privilege, this Court has recognized that the sphere of protected action must be related closely to the immunity's justifying purposes. Frequently our decisions have held that an official's absolute immunity should extend only to acts in performance of particular functions. See *Butz* v. *Economou*, *supra*, 438 U. S., at 508–517; cf. *Imbler* v. *Pachtman*, *supra*, 424 U. S., at 430–431. But the Court also has refused to draw lines finer than history and reason would

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Courts traditionally have recognized the President's constitutional responsibilities and status as factors counselling judicial deference and restraint. This Court never has held

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support. See, *e. g.*, *Spalding* v. *Vilas*, *supra*, 161 U. S., at 498 (privilege extends to all matters "committed by law to [an official's] control or supervision"); *Barr* v. *Matteo*, *supra*, 360 U. S., at 575 (fact "that the action here taken was within the outer perimeter of petitioner's line of duty is enough to render the privilege applicable. . . ."); *Stump* v. *Sparkman*, *supra*, 435 U. S., at 363 and n. 12 (judicial privilege applies even to acts occurring outside "the normal attributes of a judicial proceeding"). In view of the special nature of the President's constitutional office, we think it appropriate to extend to him absolute immunity from damage actions based on acts within the "outer perimeter" of the area of his official responsibility.

Under the Constitution and laws of the United States the President has discretionary responsibilities in a broad variety of areas, many of which are highly sensitive. In many cases it would be difficult to determine which Presidential "function" encompassed a particular action. In this case, for example, respondent argues that he was dismissed in retaliation for his testimony to Congress—a violation of 5 U. S. C. § 7211 and 18 U. S. C. § 1505. The Air Force, however, has claimed that the underlying reorganization was undertaken to promote efficiency. Assuming that the petitioner Nixon ordered the reorganization in which respondent lost his job, an inquiry into the President's motives could not be avoided under the "functional" theory asserted both by respondent and the dissent. Thus, in order to administer functional distinctions among Presidential actions, judges frequently would need to inquire into the purpose for which acts were taken. Inquiries of this kind could be highly intrusive.

Here respondent argues that petitioner Nixon would have acted outside the perimeter of his duties by ordering the discharge of respondent Fitzgerald, who was lawfully entitled to retain his job in the absence of "such cause as will promote the efficiency of the service." Brief for Respondent 39, citing 5 U. S. C. § 7512(a). Because Congress has granted this legislative protection, respondent argues, no federal official could, within his authority, cause Fitzgerald to be dismissed without satisfying this standard of proof in prescribed statutory proceedings.

This construction of the President's authority would subject him to trial on every allegation that an allegedly tortious action was taken for a forbid-

that courts may compel the President to perform even ministerial functions of his office,[35] much less subject a President to damages liability for action taken within the scope of his office.[36] By contrast, injunctions compelling action by other of-

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den purpose. Adoption of this construction thus would deprive absolute immunity of its intended effect.

It clearly is within the President's authority to "prescribe" the manner in which the Secretary will "conduct the business" of the Air Force. 10 U. S. C. § 8012(b). Because this mandate includes the authority to prescribe reorganizations and reductions in force, petitioner's alleged wrongful acts lay well within the outer perimeter of his authority.

[35] See *Mississippi* v. *Johnson*, 71 U. S. 475, 501 (1866), ("[W]e are fully satisfied that this court has no jurisidiction of a bill to enjoin the President in the performance of his official duties; and that no such bill ought to be received by us."); *Kendall* v. *United States*, 12 Pet. 524, 610 (1838) ("The executive power is vested in a President; and as far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeaching power.").

[36] Strong historical evidence supports judicial restraint with respect to any action against a President. At the time of the first Congress, Vice President John Adams and Oliver Ellsworth, Senator from Connecticut, were reported as stating that "the President, personally, was not subject to any process whatever; could have no action whatever brought against him; and above the power of all judges, justices, etc." since otherwise a court could "stop the whole machine of Government." W. Maclay, Journal of W. Maclay 167 (E. Maclay ed. 1890). Justice Story offered a similar argument somewhat later. See 3 J. Story, Commentaries on the Constitution of the United States § 1563, at 418–419 (1st ed. 1833).

Thomas Jefferson also argued that the President was not subject to judicial process. When Chief Justice Marshall held in *United States* v. *Burr*, 25 Fed. Cas. 30 (1807), that a subpoena duces tecum can be issued to a President, Jefferson protested strongly, and stated his broader view of the proper relationship between the Judiciary and the President:

"The leading principle of our Constitution is the independence of the Legislature, executive and judiciary of each other, and none are more jealous of this than the judiciary. But would the executive be independent of the judiciary, if he were subject to the *commands* of the latter, & to imprisonment for disobedience; if the several courts could bandy him from pillar to post, keep him constantly trudging from north to south & east to

ficials long have been upheld.[37] A similar distinction is reflected in the approach of this Court to cases in which various officials have claimed an evidentiary privilege. The courts generally have looked to the common law to determine the scope of an official's privilege.[38] In considering claims by the President, however, we have recognized that Presidential immunity is "rooted in the separation of powers under the Constitution." *United States* v. *Nixon*, 418 U. S. 683, 708 (1974).

It is settled law that the separation of powers doctrine does not bar every exercise of jurisdiction over the President of the United States. See, *e. g.*, *United States* v. *Nixon*, *supra*; *United States* v. *Burr*, 25 Fed. Cases 191, 196 (1807); cf. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952).[39] But our cases also have recognized that a court, before exercising jurisdiction, must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the executive

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west, and withdraw him entirely from his constitutional duties? The intention of the Constitution, that each branch should be independent of the others, is further manifested by the means it has furnished to each, to protect itself from enterprises of force attempted on them by the others, and to none has it given more effectual or diversified means than to the executive." 10 The Works of Thomas Jefferson 404. (P. Ford ed. 1905) (quoting a letter from President Jefferson to a prosecutor at the Burr trial) (emphasis in the original). See also 5 D. Malone, Jefferson and His Time: Jefferson the President 320–325 (1974).

[37] See *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952) (injunction directed to Secretary of Commerce); *Kendall* v. *United States*, *supra* (mandamus to enforce ministerial duty of the Postmaster General).

[38] See *United States* v. *Reynolds*, 345 U. S. 1, 6–7 (1953) (Secretary of the Air Force); *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 323–324 (DDC 1966), aff'd, 384 F. 2d 979 (CADC), cert denied, 389 U. S. 952 (1967) (Department of Justice officials).

[39] Although the President was not a party, the Court enjoined the Secretary of Commerce from executing a direct presidential order. See 343 U. S., at 583.

branch. See *Nixon* v. *General Services Administration*, 433 U. S. 425, 439 (1977); *United States* v. *Nixon*, 418 U. S. 683 (1974). When judicial action is needed to serve broad public interests—as when the Court acts, not in derogation of the separation of powers, but to maintain their proper balance, cf. *Youngstown Sheet & Tube Co.* v. *Sawyer*, *supra*—the exercise of jurisdiction has been held warranted. In the case of this merely private suit for damages based on a President's official acts, we hold it is not.[40]

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[40] In weighing the balance of advantages, this Court has found that there is a lesser public interest in actions for civil damages than, for example, in criminal prosecutions. See *United States* v. *Gillock*, 445 U. S. 360, 371–373 (1980); cf. *United States* v. *Nixon*, *supra*, 418 U. S., at 711–712 and n. 19 (basing holding on special importance of evidence in a criminal trial and distinguishing civil actions as raising different questions not presented for decision). It never has been denied that absolute immunity may impose a regrettable cost on individuals whose rights have been violated. But, contrary to the suggestion of the dissent, it is not true that our jurisprudence ordinarily supplies a remedy in civil damages for every legal wrong. The dissent's objections on this ground would weigh equally against absolute immunity for any official. Yet the dissent makes no attack on the absolute immunity recognized for judges and prosecutors.

Our implied-rights-of-action cases identify another area of the law in which there is not a damages remedy for every legal wrong. These cases establish that victims of statutory crimes ordinarily may not sue in federal court in the absence of expressed congressional intent to provide a damages remedy. See, *e. g.*, *Merrill Lynch*, *supra*; *Sea Clammers*, *supra*; *California* v. *Sierra Club*, *supra*. The dissent does not refer to the jurisprudence of implied rights of action. Finally, the dissent undertakes no discussion of cases in the *Bivens* line in which this Court has suggested that that there would be no damages relief in circumstances "counselling hesitation" by the judiciary. See *Bivens* v. *Six Unknown Federal Agents*, *supra*, 403 U. S., at 396; *Carlson* v. *Green*, *supra*, 446 U. S., at 19 (in direct constitutional actions against officials with "independent status in our constitutional scheme . . . judicially created remedies . . . might be inappropriate").

Even the case on which the dissent places principal reliance, *Marbury* v. *Madison*, 1 Cranch 137 (1803), provides dubious support at best. The dissent cites *Marbury* for the proposition that "The very essence of civil lib-

V

A rule of absolute immunity for the President will not leave the Nation without sufficient protection against misconduct on the part of the chief executive.[41] There remains the constitutional remedy of impeachment.[42] In addition, there are formal and informal checks on Presidential action that do not apply with equal force to other executive officials. The President is subjected to constant scrutiny by the press. Vigilant oversight by Congress also may serve to deter Presidential abuses of office, as well as to make credible the threat of impeachment.[43] Other incentives to avoid misconduct may include a desire to earn re-election, the need to maintain prestige as an element of Presidential influence, and a President's traditional concern for his historical stature.

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erty consists in the right of the individual to claim the protection of the laws, whenever he receives an injury." *Id.*, at 163. Yet *Marbury* does not establish that the individual's protection must come in the form of a particular remedy. Marbury, it should be remembered, *lost* his case in the Supreme Court. The Court turned him away with the suggestion that he should have gone elsewhere with his claim. In this case it was clear at least that Fitzgerald was entitled to seek lost wages before the Civil Service Commission—a remedy of which he availed himself. See *supra*, at 4–6 and n. 17.

[41] The presence of alternative remedies has played an important role in our previous decisions in the area of official immunity. *E. g.*, *Imbler* v. *Pachtman*, *supra*, 424 U. S., at 428–429 ("We emphasize that the immunity of prosecutors from liability in suits under § 1983 does not leave the public powerless to deter misconduct or to punish that which occurs.").

[42] The same remedy plays a central role with respect to the misconduct of federal judges, who also possess absolute immunity. See Kaufman, Chilling Judicial Independence, 88 Yale L.J. 681, 690–706 (1979). Congressmen may be removed from office by a vote of their colleagues. U. S. Const., Art. I, § 5, cl. 2.

[43] Prior to petitioner Nixon's resignation from office, the House Judiciary Committee had convened impeachment hearings. See generally Report of the Committee on the Judiciary of the House of Representatives: Impeachment of Richard M. Nixon President of the United States, H.R. Rep. No. 93–1305 (1974).

The existence of alternative remedies and deterrents establishes that absolute immunity will not place the President "above the law."[*] For the President, as for judges and prosecutors, absolute immunity merely precludes a particular private remedy for alleged misconduct in order to advance compelling public ends.

VI

For the reasons stated in this opinion, the decision of the Court of Appeals is reversed and the case remanded for action consistent with this opinion.

So ordered.

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[*] "The dissent's contrary argument that our decision places the President "above the law," *ante*, at 3–4, is rhetorically chilling but wholly unjustified. The remedy of impeachment demonstrates that the President remains accountable under law for his misdeeds in office. This case involves only a damages remedy. Although the President is not liable in civil damages for official misbehavior, that does not lift him "above" the law. The dissent does not suggest that a judge is "above" the law when he enters a judgment for which he cannot be held answerable in civil damages; or a prosecutor is above the law when he files an indictment; or a Congressman is above the law when he engages in legislative speech or debate. It is simple error to characterize an official as "above the law" because a particular remedy is not available against him.

Stylistic changes throughout
Footnotes renumbered
1, 8, 15-25

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: MAY 26 1982

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1738

RICHARD NIXON, PETITIONER, *v.*
A. ERNEST FITZGERALD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[May ——, 1982]

JUSTICE POWELL delivered the opinion of the Court.

The plaintiff in this lawsuit seeks relief in civil damages from a former President of the United States. The claim rests on actions allegedly taken in the former President's official capacity during his tenure in office. The issue before us is the scope of the immunity possessed by the President of the United States.

I

In January 1970 the respondent A. Ernest Fitzgerald lost his job as a management analyst with the Department of the Air Force. Fitzgerald's dismissal occurred in the context of a departmental reorganization and reduction in force, in which his job was eliminated. In announcing the reorganization, the Air Force characterized the action as taken to promote economy and efficiency in the armed forces.

Respondent's discharge attracted unusual attention in Congress and in the press. Fitzgerald had attained national prominence approximately one year earlier, during the waning months of the presidency of Lyndon B. Johnson. On November 13, 1968, Fitzgerald appeared before the Subcommittee on Economy in Government of the Joint Economic Committee of the United States Congress. To the apparent embarrassment of his superiors in the Department of De-

fense, Fitzgerald testified that cost-overruns on the C–5A transport plane could approximate $2 billion.[1] He also revealed that unexpected technical difficulties had arisen during the development of the aircraft.

Concerned that Fitzgerald might have suffered retaliation for his congressional testimony, the Subcommittee on Economy in Government convened public hearings on Fitzgerald's dismissal.[2] The press reported those hearings prominently, as it had the earlier announcement that his job was being eliminated by the Department of Defense. At a news conference on December 8, 1969, President Richard Nixon was queried about Fitzgerald's impending separation from government service.[3] The President responded by promising to

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[1] See *Economics of Military Procurement: Hearings Before the Subcommittee on Economy in Government of the Joint Economic Comm.*, 90th Cong., 2d Sess., Part I, at 199–201 (1968–1969). It is not disputed that officials in the Department of Defense were both embarrassed and angered by Fitzgerald's testimony. Within less than two months of respondent's congressional appearance, staff had prepared a memorandum for the outgoing Secretary of the Air Force, Harold Brown, listing three ways in which Fitzgerald might be removed from his position. See App. 209–211 (Memorandum of John Lang to Harold Brown, Jan. 6, 1969). Among these was a "reduction in force"—the means by which Fitzgerald ultimately was removed by Brown's successor in office under the new Nixon administration. The reduction in force was announced publicly on November 4, 1969, and Fitzgerald accordingly was separated from the Air Force upon the elimination of his job on January 5, 1970.

[2] See *The Dismissal of A. Ernest Fitzgerald by the Department of Defense: Hearings Before the Subcomm. on Economy in Government of the Joint Economic Comm.*, 91st Cong., 1st Sess. (1969). Some 60 Members of Congress also signed a letter to the President protesting the "firing of this dedicated public servant" as a "punitive action." *Id.*, at 115–116.

[3] A briefing memorandum on the Fitzgerald matter had been prepared by White House staff in anticipation of a possible inquiry at the forthcoming press conference. Authored by aide Patrick Buchanan, it advanced the view that the Air Force was "firing . . . a good public servant." App. 269 (Memorandum of Patrick Buchanan to Richard Nixon, December 5, 1969). The memorandum suggested that the President order Fitzgerald's

look into the matter.[4] Shortly after the news conference the petitioner asked White House Chief of Staff H.R. Haldeman to arrange for Fitzgerald's assignment to another job within the Administration.[5] It also appears that the President suggested to Budget Director Robert Mayo that Fitzgerald might be offered a position in the Bureau of the Budget.[6]

Fitzgerald's proposed reassignment encountered resistance within the Administration.[7] In an internal memorandum of January 20, 1970, White House aide Alexander Butterfield reported to Haldeman that "Fitzgerald is no doubt a top-notch cost expert, but he must be given very low marks in loyalty; and after all, loyalty is the name of the game."[8] Butterfield therefore recommended that "We should let him bleed, for a while at least."[9] There is no evidence of White

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retention by the Defense Department.

[4] App. 228.

[5] See App. 109–112 (Deposition of H.R. Haldeman); App. 137–141 (Deposition of petitioner Richard Nixon). Haldeman's deposed testimony was based on his handwritten notes of December 12, 1969. App. 275.

[6] See App. 126 (Deposition of Robert Mayo); App. 141 (Deposition of Richard Nixon).

[7] Both Mayo and his deputy, James Schlesinger, appear to have resisted at least partly due to a suspicion that Fitzgerald lacked institutional loyalty to Executive policies and that he spoke too freely in communications with friends on Capitol Hill. Both also stated that high level positions were presently unavailable within the Bureau of the Budget. See App. 126 (Deposition of Robert Mayo); App. 146–147 (Deposition of James Schlesinger).

[8] Quoted in *Decision on the Appeal of A. Ernest Fitzgerald* (*CSC Decision*), reprinted in App., at 60, 84 (September 18, 1973). (Page citations to the *CSC Decision* refer to the cited page in the Joint Appendix).

[9] *Id.*, at 85. The memorandum added that "We owe 'first choice on Fitzgerald' to [Senator] Proxmire and others who tried so hard to make him a hero [for exposing the cost overruns]." Suspicion of Fitzgerald's assumed loyalty toward Senator Proxmire was widely shared in the White House and in the Defense Department. According to the *CSC Decision*, *supra*: "While Mr. Fitzgerald has denied that he was 'Senator Proxmire's boy in the Air Force,' and he may honestly believe it, we find this statement difficult to accept. It is evident that the top officials in the Air Force, without

House efforts to reemploy Fitzgerald subsequent to the Butterfield memorandum.

Absent any offer of alternative federal employment, Fitzgerald complained to the Civil Service Commission. In a letter of January 20, 1970, he alleged that his separation represented unlawful retaliation for his truthful testimony before a congressional committee.[10] The Commission convened a closed hearing on Fitzgerald's allegations on May 4, 1971. Fitzgerald, however, preferred to present his grievances in public. After he had brought suit and won an injunction, *Fitzgerald* v. *Hampton*, 467 F. 2d 755 (CADC 1972), public hearings commenced on January 26, 1973. The hearings again generated publicity, much of it devoted to the testimony of Air Force Secretary Robert Seamans. Although he denied that Fitzgerald had lost his position in retaliation for congressional testimony, Seamans testified that he had received "some advice" from the White House before Fitzgerald's job was abolished.[11] But the Secretary declined to be more specific. He responded to several questions by invoking "executive privilege."[12]

At a news conference on January 31, 1973, the President was asked about Mr. Seamans' testimony. Mr. Nixon took the opportunity to assume personal responsibility for Fitzgerald's dismissal:

> "I was totally aware that Mr. Fitzgerald would be fired or discharged or asked to resign. I approved it and Mr. Seamans must have been talking to someone who had discussed the matter with me. No, this was

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specifically saying so, considered him to be just that. . . . We also note that upon leaving the Air Force Mr. Fitzgerald was employed as a consultant by the Proxmire Committee and that Senator Proxmire appeared at the Commission hearing as a character witness for [Fitzgerald]." App. 83.

[10] *Id.*, at 61.

[11] See *id.*, at 83–84.

[12] See *ibid.*

> not a case of some person down the line deciding he should go. It was a decision that was submitted to me. I made it and I stick by it."[13]

A day later, however, the White House press office issued a retraction of the President's statement. According to a press spokesman, the President had confused Fitzgerald with another former executive employee. On behalf of the President, the spokesman asserted that Mr. Nixon had not had "put before him the decision regarding Mr. Fitzgerald."[14]

After hearing over 4,000 pages of testimony, the Chief Examiner for the Civil Service Commission issued his decision in the Fitzgerald case on September 18, 1973. *Decision on the Appeal of A. Ernest Fitzgerald*, as reprinted in App., at 60. The Examiner held that Fitzgerald's dismissal had offended applicable civil service regulations. App. 86–87.[15] The Examiner based this conclusion on a finding that the departmental reorganization in which Fitzgerald lost his job,

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[13] App. 185. A few hours after the press conference, Mr. Nixon repeated privately to Presidential aide Charles Colson that he had ordered Fitzgerald's firing. App. 214–215 (recorded conversation of Jan. 31, 1973).

[14] App. 196 (transcription of statement of White House press secretary Ronald Ziegler, Feb. 1, 1973). In a conversation with aide John Ehrlichman, following his conversation with Charles Colson, see *supra* note 13, the President again had claimed responsibility for Fitzgerald's dismissal. When Ehrlichman corrected him on several details, however, the President concluded that he was "thinkin' of another case." App. 218 (recorded conversation of Jan. 31, 1973). See *id.*, at 220. It was after this conversation that the retraction was ordered.

[15] Fitzgerald's position in the Air Force was in the "excepted service" and therefore not covered by civil service rules and regulations for the competitive service. *Fitzgerald* v. *Hampton*, 467 F. 2d 755, 758 (CADC 1972); see *CSC Decision*, App., at 63–64. In *Hampton*, however, the court held that Fitzgerald's employment nonetheless was under "legislative protection," since he was a "preference eligible" veteran entitled to various statutory protections under the Veterans Preference Act. See 467 F. 2d, at 758–768. Among these were the benefits of the reduction in force procedures established by civil service regulation. See 467 F. 2d, at 758.

though purportedly implemented as an economy measure, was in fact motivated by "reasons purely personal to" respondent. *Id.*, at 86. As this was an impermissible basis for a reduction in force,[16] the Examiner recommended Fitzgerald's reappointment to his old position or to a job of comparable authority.[17] The Examiner, however, explicitly distinguished this narrow conclusion from a suggested finding that Fitzgerald had suffered retaliation for his testimony to Congress. As found by the Commission, "the evidence in the record does not support [Fitzgerald's] allegation that his position was abolished and that he was separated . . . in retaliation for his having revealed the C–5A cost overrun in testimony before the Proxmire Committee on November 13, 1968." *Id.*, at 81.

Following the Commission's decision, Fitzgerald filed a suit for damages in the United States District Court. In it he raised essentially the same claims presented to the Civil Service Commission.[18] As defendants he named eight offi-

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[16] The Examiner found that Fitzgerald in fact was dismissed because of his superiors' dissatisfaction with his job performance. App. 86–87. Their attitude was evidenced by "statements that he was not a 'team player' and 'not on the Air Force team.'" App. 83. Without deciding whether this would have been an adequate basis for an "adverse action" against Fitzgerald as an "inadequate or unsatisfactory employee," *id.*, at 86, the Examiner held that the Commission's adverse action procedures, current version codified at 5 CFR § 752, implicitly forbade the Air Force to employ a "reduction in force" as a means of dismissing respondent for reasons "personal to" him. App. 87.

[17] The Commission also ordered that Fitzgerald should receive back pay. App. 87–88. Despite the Commission's order, respondent avers that he "has still not obtained reinstatement to a position equivalent to his former one," Brief for Respondent, at 11, n. 17, and that he therefore has brought an enforcement action in the District Court.

[18] The complaint alleged a continuing conspiracy to deprive him of his job, to deny him reemployment, and to besmirch his reputation. Fitzgerald alleged that the conspiracy had continued through the Commission hearings and remained in existence at the initiation of the lawsuit. See *Fitzgerald* v. *Seamans*, 384 F. Supp. 688, 690–692 (DC 1974).

cials of the Defense Department, White House aide Alexander Butterfield, and "one or More" unnamed "White House Aides" styled only as "John Does."

The District Court dismissed the action under the District of Columbia's three-year statute of limitations, *Fitzgerald* v. *Seamans*, 384 F. Supp. 688 (D.D.C. 1974), and the Court of Appeals affirmed as to all but one defendant, White House aide Alexander Butterfield, *Fitzgerald* v. *Seamans*, 553 F. 2d 220 (CADC 1977). The Court of Appeals reasoned that Fitzgerald had no reason to suspect White House involvement in his dimissal at least until 1973. In that year, reasonable grounds for suspicion had arisen, most notably through publication of the internal White House memorandum in which Butterfield had recommended that Fitzgerald at least should be made to "bleed for a while" before being offered another job in the Administration. *Id.*, at 225, 229. Holding that concealment of illegal activity would toll the statute of limitations, the Court of Appeals remanded the action against Butterfield for further proceedings in the District Court.

Following the remand and extensive discovery thereafter, Fitzgerald filed a Second Amended Complaint in the District Court on July 5, 1978. It was in this amended complaint—more than eight years after he had complained of his discharge to the Civil Service Commission—that Fitzgerald first named the petitioner Nixon as a party defendant.[18] Also included as defendants were White House aide Bryce Harlow and other officials of the Nixon administration. Additional discovery ensued. By March 1980, only three defendants remained: the petitioner Richard Nixon and White House aides

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[18] The general allegations of the complaint remained essentially unchanged. In averring Nixon's participation in the alleged conspiracy against him, the complaint quoted petitioner's press conference statement that he was "totally aware" of and in fact "approved" Fitzgerald's dismissal. Second Amended Complaint 6.

Harlow and Butterfield. Denying a motion for summary judgment, the District Court ruled that the action must proceed to trial. Its order of March 26 held that Fitzgerald had stated triable causes of action under two federal statutes and the First Amendment to the Constitution.[2] The Court also ruled that petitioner was not entitled to claim absolute presidential immunity.

Petitioner took a collateral appeal of the immunity decision to the Court of Appeals for the District of Columbia Circuit. The Court of Appeals dismissed summarily. It apparently did so on the ground that its recent decision in *Halperin* v. *Kissinger*, 606 F. 2d 1192 (CADC 1979), aff'd by an equally divided vote, 452 U. S. 713 (1981), had rejected this claimed immunity defense.

As this Court has not ruled on the scope of immunity available to a President of the United States, we granted certiorari to decide this important issue. 452 U. S. 957 (1981).

II

Before addressing the merits of this case, we must consider two challenges to our jurisdiction. In his opposition to

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[2] See Cert. App. 1–2. The District Court held that respondent was entitled to "infer" a cause of action under 5 U. S. C. § 7211 and 18 U. S. C. § 1505. Neither expressly confers a private right to sue for relief in damages. The first, 5 U. S. C. § 7211 (Supp. III 1979), provides generally that "The right of employees . . . to . . . furnish information to either House of Congress, or to a committee or a Member thereof, may not be interfered with or denied." The second, 18 U. S. C. § 1505, is a criminal statute making it a crime to obstruct congressional testimony. The correctness of the decision that a cause of action could be "implied" under these statutes is not currently before us. As explained *infra*, this case is here under the "collateral order" doctrine, for review of the District Court's denial of petitioner's motion to dismiss on the ground that he enjoyed absolute immunity from civil suit. The District Court also held that respondent had stated a claim under the common law of the District of Columbia, but respondent subsequently abandoned his common law cause of action. See Supplemental Brief for Respondent 2 (May 14, 1980).

omission

the petition for certiorari, respondent argued that this Court is without jurisdiction to review the non-final order in which the District Court rejected petitioner's claim to absolute immunity.[21] We also must consider an argument that an agreement between the parties has mooted the controversy.

A

Petitioner invokes the jurisdiction of this Court under 28 U. S. C. § 1254, a statute that invests us with authority to review "[c]ases in" the courts of appeals.[22] When the petitioner in this case sought review of an interlocutory order denying his claim to absolute immunity, the Court of Appeals dismissed the appeal for lack of jurisdiction. Emphasizing the "jurisdictional" basis for the Court of Appeals' decision, respondent argued that the District Court's order was not an appealable "case" properly "in" the Court of Appeals within the meaning of § 1254. We do not agree.

Under the "collateral order" doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949), a small class of interlocutory orders are immediately appealable to the courts of appeals. As defined by *Cohen*, this class embraces orders that "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and [are] effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 468 (1978); see *Cohen*, *supra*, 337 U. S., at 546–547. As an additional requirement,

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[21] See Brief for Respondent in Opposition 2. Although Fitzgerald has not continued to urge this argument, the challenge was jurisdictional, and we therefore address it.

[22] The statute provides in pertinent part:

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. . . .

28 U. S. C. § 1254.

Cohen established that a collateral appeal of an interlocutory order must "present[] a serious and unsettled question." 337 U. S., at 547. At least twice before this Court has held that orders denying claims of absolute immunity are appealable under the *Cohen* criteria. See *Helstoski* v. *Meanor*, 442 U. S. 500 (1979) (claim of immunity under the Speech and Debate Clause); *Abney* v. *United States*, 431 U. S. 651 (1977) (claim of immunity under Double Jeopardy Clause). In previous cases the Court of Appeals for the District of Columbia Circuit also has treated orders denying absolute immunity as appealable under *Cohen*. See *Briggs* v. *Goodwin*, 569 F. 2d 10, 58–60 (CADC 1977) (Wilkey, J., writing separately for the Court on the appealability issue); *McSurely* v. *McClellan*, 521 F. 2d 1024, 1032 (1975), aff'd in pertinent part en banc, 553 F. 2d 1277, 1283–1284 n. 18 (1976), cert dismissed *sub nom. McAdams* v. *McSurely*, 438 U. S. 189 (1978).

In "dismissing" the appeal in this case, the Court of Appeals appears to have reasoned that petitioner's appeal lay outside the *Cohen* doctrine because it raised no "serious and unsettled question" of law. This argument was pressed by the respondent, who asked the Court of Appeals to dismiss on the basis of that court's "controlling" decision in *Halperin* v. *Kissinger*, *supra*.

Under the circumstances of this case, we cannot agree that petitioner's interlocutory appeal failed to raise a "serious and unsettled" question. Although the Court of Appeals had ruled in *Halperin* v. *Kissinger* that the President was not entitled to absolute immunity, this Court never had so held. And a petition for certiorari in *Halperin* was pending in this Court at the time petitioner's appeal was dismissed. In light of the special solicitude due to claims alleging a threatened breach of essential Presidential prerogatives under the separation of powers, see *United States* v. *Nixon*, 418 U. S. 683, 691–692 (1974), we conclude that petitioner did present a "serious and unsettled" and therefore appealable question to the Court of Appeals. It follows that the case was "in" the

Court of Appeals under § 1254 and properly within our certiorari jurisdiction.[23]

B

Shortly after petitioner had filed his petition for ceriorari in this Court and respondent had entered his opposition, the parties reached an agreement to liquidate damages.[24] Under its terms the petitioner Nixon paid the respondent Fitzgerald a sum of $142,000. In consideration Fitzgerald agreed to accept liquidated damages of $28,000 in the event of a ruling by this Court that petitioner was not entitled to absolute immunity. In case of a decision upholding petitioner's immunity claim, no further payments would be made.

The limited agreement between the parties left both petitioner and respondent with a considerable financial stake in the resolution of the question presented in this Court. As we recently concluded in a case involving a similar contract,

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[23] There can be no serious doubt concerning our power to review a court of appeals' decision to dismiss for lack of jurisdiction—a power we have exercised routinely. See, *e. g.*, *Gardner* v. *Westinghouse Broadcasting Co.*, 437 U. S. 478 (1978). If we lacked authority to do so, decisions to dismiss for want of jurisdiction would be insulated entirely from review by this Court.

Nor, now that we have taken jurisdiction of the case, need we remand to the Court of Appeals for a decision on the merits. The immunity question is a pure issue of law, appropriate for our immediate resolution. Especially in light of the Court of Appeals' now-binding decision of the issue presented, concerns of judicial economy fully warrant our decision of the important question presented.

[24] Respondent filed a copy of this agreement with the Clerk of this Court on August 24, 1981, as an appendix to his Brief in Opposition to a Motion of Morton, Ina, David, Mark and Gary Halperin to Intervene and for Other Relief. On June 10, 1980, prior to the Court's action on the petition for certiorari, counsel to the parties had advised the Court that their clients had reached an agreement to liquidate damages, but that there remained a live controversy. Counsel did not include a copy of the agreement in their initial submission.

"Given respondents' continued active pursuit of monetary relief, this case remains 'definite and concrete, touching the legal relations of parties having adverse legal interests.'" *Havens Realty Co.* v. *Coleman*, —— U. S. ——, —— (1982), quoting *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240–241 (1937).

III

A

This Court consistently has recognized that government officials are entitled to some form of immunity from suits for civil damages. In *Spalding* v. *Vilas*, 161 U. S. 483 (1896), the Court considered the immunity available to the Postmaster General in a suit for damages based upon his official acts. Drawing upon principles of immunity developed in English cases at common law, the Court concluded that "[t]he interests of the people" required a grant of absolute immunity to public officers. *Id.*, at 498. In the absence of immunity, the Court reasoned, executive officials would hesitate to exercise their discretion in a way "injuriously affect[ing] the claims of particular individuals," *id.*, at 499, even when the public interest required bold and unhesitating action. Considerations of "public policy and convenience" therefore compelled a judicial recognition of immunity from suits arising from official acts.

> "In exercising the functions of his office, the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government, if he were subjected to any such restraint."

Id., at 498.

Decisions subsequent to *Spalding* have extended the defense of immunity to actions besides those at common law. In *Tenney* v. *Brandhove*, 341 U. S. 367 (1951), the Court considered whether the passage of 42 U. S. C. § 1983, which made no express provision for immunity for any official, had abrogated the privilege accorded to state legislators at common law. *Tenney* held that it had not. Examining § 1983 in light of the "presuppositions of our political history" and our heritage of legislative freedom, the Court found it incredible "that Congress . . . would impinge on a tradition so well grounded in history and reason" without some indication of intent more explicit than the general language of the statute. *Id.*, at 376. Similarly, the decision in *Pierson* v. *Ray*, 386 U. S. 547 (1967), involving a § 1983 suit against a state judge, recognized the continued validity of the absolute immunity of judges for acts within the judicial role. This was a doctrine "'not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.'" *Id.*, at 554, quoting, *Scott* v. *Stansfield*, L.R. 3 Ex. 220, 223 (1868). See *Bradley* v. *Fisher*, 13 Wall. 335 (1872). The Court in *Pierson* also held that police officers are entitled to a qualified immunity protecting them from suit when their official acts are performed in "good faith." *Id.*, at 557.

In *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974), the Court considered the immunity available to state executive officials in a § 1983 suit alleging the violation of constitutional rights. In that case we rejected the officials' claim to absolute immunity under the doctrine of *Spalding* v. *Vilas*, finding instead that state executive officials possessed a "good faith" immunity from § 1983 suits alleging constitutional violations. Balancing the purposes of § 1983 against the imperatives of public policy, the Court held that "in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of

discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based." 416 U. S., at 247.

As construed by subsequent cases, *Scheuer* established a two-tiered division of immunity defenses in § 1983 suits. To most executive officers *Scheuer* accorded qualified immunity. For them the scope of the defense varied in proportion to the nature of their official functions and the range of decisions that conceivably might be taken in "good faith". This "functional" approach also defined a second tier, however, at which the especially sensitive duties of certain officials—notably judges and prosecutors—required the continued recognition of absolute immunity. See, *e. g.*, *Imbler* v. *Pachtman*, 424 U. S. 409 (1976) (state prosecutors possess absolute immunity with respect to the initiation and pursuit of prosecutions); *Stump* v. *Sparkman*, 435 U. S. 349 (1978) (state judge possesses absolute immunity for all judicial acts).

This approach was reviewed in detail in *Butz* v. *Economou*, 438 U. S. 478 (1978), when we considered for the first time the kind of immunity possessed by *federal* executive officials who are sued for constitutional violations.[28] In *Butz* the Court rejected an argument, based on decisions involving federal officials charged with common law torts, that all high federal officials have a right to absolute immunity from constitutional damage actions. Concluding that a blanket recognition of absolute immunity would be anomalous in light of the qualified immunity standard applied to state executive officials, 438 U. S., at 504, we held that federal officials generally have the same qualified immunity possessed by state officials in cases under § 1983. In so doing we reaffirmed our holdings that some officials, notably judges and prosecutors,

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[28] *Spalding* v. *Vilas*, *supra*, was distinguished on the ground that the suit against the Postmaster General had asserted a common law—and not a constitutional—cause of action. See *Butz*, *supra*, 438 U. S., at 493–495.

"because of the special nature of their responsibilities," *id.*, at 511, "require a full exemption from liability." *Id.*, at 508. In *Butz* itself we upheld a claim of absolute immunity for administrative officials engaged in functions analogous to those of judges and prosecutors. *Ibid.* We also left open the question whether other federal officials could show that "public policy requires an exemption of that scope." *Id.*, at 506.

B

Our decisions concerning the immunity of government officials from civil damages liability have been guided by the Constitution, federal statutes, and history. Additionally, at least in the absence of explicit constitutional or congressional guidance, our immunity decisions have been informed by the common law. See *Butz* v. *Economou*, *supra*, at 508; *Imbler* v. *Pachtman*, 424 U. S. 409, 421 (1976). This Court necessarily also has weighed concerns of public policy, especially as illuminated by our history and the structure of our government. See, *e. g.*, *Butz* v. *Economou*, *supra*, at 508; *Imbler* v. *Pachtman*, *supra*, at 421; *Spalding* v. *Vilas*, *supra*, at 498.[25]

This case now presents the claim that the President of the United States is shielded by absolute immunity from civil damages liability. In the case of the President the inquiries into history and policy, though mandated independently by our cases, tend to converge. Because the Presidency did not exist through most of the development of common law, any historical analysis must draw its evidence primarily from our constitutional heritage and structure. Historical inquiry thus merges almost at its inception with the kind of "public

[25] Although the Court in *Butz* v. *Economou*, *supra*, at 508, described the requisite inquiry as one of "public policy," the focus of inquiry more accurately may be viewed in terms of the "inherent" or "structural" assumptions of our scheme of government.

policy" analysis appropriately undertaken by a federal court. This inquiry involves policies and principles that may be considered implicit in the nature of the President's office in a system structured to achieve effective government under a constitutionally mandated separation of powers.

IV

Here a former President asserts his immunity from civil damages claims of two kinds. He stands named as a defendant in a direct action under the Constitution and in two statutory actions under federal laws of general applicability. In neither case has Congress taken express legislative action to subject the President to civil liability for his official acts.[27]

Applying the principles of our cases to claims of this kind, we hold that petitioner, as a former President of the United States, is entitled to absolute immunity from damages liability predicated on his official acts. We consider this immu-

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[27] In the present case we therefore are presented only with "implied" causes of action, and we need not address directly the immunity question as it would arise if Congress expressly had created a damages action against the President of the United States. This approach accords with this Court's settled policy of avoiding unnecessary decision of constitutional issues. Reviewing this case under the "collateral order" doctrine, see *supra*, we assume for purposes of this opinion that p ivate causes of action may be inferred both under the First Amendment and the two statutes on which respondent relies. But it does not follow that we must—in considering a *Bivens* remedy or interpreting a statute *in light of the immunity doctrine*—assume that the cause of action runs against the President of the United States. Cf. *Tenney* v. *Brandhove*, 341 U. S. 367, 376 (1951) (construing § 1983 in light of the immunity doctrine, the Court could not accept "that Congress . . . would impinge on a tradition [of legislative immunity] so well grounded in history and reason by convert inclusion in the general language before us," and therefore would not address issues that would arise if Congress had undertaken to deprive state legislators of absolute immunity). Consequently, our holding today need only be that the President is absolutely [illegible] from civil damages liability in the absence of explicit affirmative action by Congress. We decide only this constitutional issue, which is necessary to disposition of the case before us.

immune

top official acts

nity a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history. Justice Story's analysis remains persuasive:

> "There are . . . incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions, which are confided to it. Among these, must necessarily be included the power to perform them . . . . The president cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability." J. Story, Commentaries on the Constitution of the United States, § 1563, at 418–419 (1833 ed.).

A

The President occupies a unique position in the constitutional scheme. Article II of the Constitution provides that "[t]he executive Power shall be vested in a President of the United States. . . ." This grant of authority establishes the President as the chief constitutional officer of the Executive Branch, entrusted with supervisory and policy responsibilities of utmost d scretion and sensitivity. These include the enforcement of federal law—it is the President who is charged constitutionally to "take care that the laws be faithfully executed";[28] the conduct of foreign affairs—a realm in which the Court has recognized that "[i]t would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret";[29] and management of the Executive Branch—a task for which "imperative reasons re-

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[28] U. S. Const., Art II, § 3.

[29] *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U. S. 103, 111 (1948).

quir[e] an unrestricted power [in the President] to remove the most important of his subordinates in their most important duties."[30]

In arguing that the President is entitled only to qualified immunity, the respondent relies on cases in which we have recognized immunity of this scope for governors and cabinet officers. *E. g.*, *Butz* v. *Economou*, *supra*; *Scheuer* v. *Rhodes*, *supra*. We find these cases to be inapposite. The President's unique status under the Constitution distinguishes him from other executive officials.[31]

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[30] *Myers* v. *United States*, 272 U. S. 52, 134–135 (1926).

[31] Noting that the "Speech and Debate Clause" provides a textual basis for congressional immunity, respondent argues that the Framers must be assumed to have rejected any similar grant of Executive immunity. This argument is unpersuasive. First, a specific textual basis has not been considered a prerequisite to the recognition of immunity. No provision expressly confers judicial immunity. Yet the immunity of judges is well settled. See, *e. g.*, *Bradley* v. *Fisher*, 13 Wall 335 (1872); *Stump* v. *Sparkman*, *supra*. Second, this Court already has established that absolute immunity may be extended to certain officials of the Executive Branch. *Butz* v. *Economou*, *supra*, 438 U. S., at 511–512; see *Imbler* v. *Pachtman*, *supra* (extending immunity to prosecutorial officials within the Executive Branch). Third, there is historical evidence from which it may be inferred that the Framers assumed the President's immunity from damages liability. At the Constitutional Convention several delegates expressed concern that subjecting the President even to impeachment would impair his capacity to perform his duties of office. See 2 M. Farrand, Records of the Constitutional Convention of 1787 (1934), at 64 (remarks of Gouvernor Morris); *id.*, at 66 (remarks of Charles Pinckney). The delegates of course did agree to an Impeachment Clause. But nothing in their debates suggests an expectation that the President would be subjected to the distraction of suits by disappointed private citizens. Litigation of this kind simply may have been unthinkable in the era of the Constitutional Convention. Senator Maclay has recorded the views of Senator Ellsworth and Vice-President John Adams—both delegates to the Convention—that "the President, personally, was not subject to any process whatever. . . . For [that] would put it in the power of a common justice to exercise any authority over him, and stop the whole machine of government." W. Maclay, Journal of W. Maclay 167 (E. Maclay ed. 1890). And Justice Story, writing in 1833, held it implicit in the separation of powers that the President

footnote omitted

Because of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government. As is the case with prosecutors and judges—

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must be permitted to discharge his duties undistracted by private lawsuits. J. Story, Commentaries on the Constitution of the United States, § 1563, at 418–419 (1833 ed.) (quoted *supra*).

Thomas Jefferson also argued that the President was not subject to judicial process. When Chief Justice Marshall held in *United States* v. *Burr*, 25 Fed. Cas. 30 (1807), that a subpoena duces tecum can be issued to a President, Jefferson protested strongly, and stated his broader view of the proper relationship between the Judiciary and the President:

"The leading principle of our Constitution is the independence of the Legislature, executive and judiciary of each other, and none are more jealous of this than the judiciary. But would the executive be independent of the judiciary, if he were subject to the *commands* of the latter, & to imprisonment for disobedience; if the several courts could bandy him from pillar to post, keep him constantly trudging from north to south & east to west, and withdraw him entirely from his constitutional duties? The intention of the Constitution, that each branch should be independent of the others, is further manifested by the means it has furnished to each, to protect itself from enterprises of force attempted on them by the others, and to none has it given more effectual or diversified means than to the executive." 10 The Works of Thomas Jefferson 404. (P. Ford ed. 1905) (quoting a letter from President Jefferson to a prosecutor at the Burr trial) (emphasis in the original). See also 5 D. Malone, Jefferson and His Time: Jefferson the President 320–325 (1974).

Attempting to minimize the significance of this evidence, the dissent claims that the historical support for absolute Presidential immunity is not "firm." *Post*, at 13. Although it cites some ambiguous comments made at two *state* ratifying Conventions, the dissent's chief argument appears to be that the documentary materials are too fragmentary to be conclusive. Our view is not wholly to the contrary. In light of the undeniable paucity of documentary sources, we think the most compelling arguments for absolute Presidential immunity arise from the separation of powers and the judiciary's historic understanding of that doctrine. See text *supra*. But our reliance on those factors should not be misunderstood. The best historical evidence *supports* the Presidential immunity we have upheld. Not only do the debates of the Framers accord with our conclusions; other powerful support derives from the actual history of private lawsuits against the President. Prior to the litigation explosion commencing with this Court's

for whom absolute immunity now is established—a President must concern himself with matters likely to "arouse the most intense feelings." *Pierson* v. *Ray*, *supra*, 386 U. S., at 554. Yet, as our decisions have recognized, it is in precisely such cases that there exists the greatest public interest in providing an official "the maximum ability to deal fearlessly and impartially with" the duties of his office. *Ferri* v. *Ackerman*, 444 U. S. 193, 203 (1979) (footnote omitted). This concern is compelling where the officeholder must make the most sensitive and far-reaching decisions entrusted to any official under our constitutional system.[32] Nor can the sheer prominence of the President's office be ignored. In view of the visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for suits for civil damages.[33] Cognizance of this personal vulnerability frequently could distract a President from his public duties, to the detriment not only of the President and his office but also the nation that the Presidency was designed to serve.[34]

1971 *Bivens* decision, fewer than a handful of damages action ever were filed against the President. None appears to have proceeded to judgment on the merits.

[32] Among the most powerful reasons supporting official immunity is the prospect that damages liability may render an official unduly cautious in the discharge of his official duties. As Judge Learned Hand wrote in *Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (CA2 1949), cert denied, 339 U. S. 949 (1950), "[t]he justification for . . . [denying recovery] is that it is impossible to know whether the claim is well founded until the case has been tried, and to submit all officials, the innocent as well as the guilty, to the burden of trial and the danger of its outcome would dampen the ardor of all but the most resolute. . . ."

[33] These dangers are significant even though there is no historical record of numerous suits against the President, since a right to sue federal officials for damages for constitutional violations was not even recognized until *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971).

[34] In defining the scope of an official's absolute privilege, this Court has recognized that the sphere of protected action must be related closely to the immunity's justifying purposes. Frequently our decisions have held

B

Courts traditionally have recognized the President's constitutional responsibilities and status as factors counselling judicial deference and restraint.[35] For example, while courts

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that an official's absolute immunity should extend only to acts in performance of particular functions. See *Butz* v. *Economou*, *supra*, 438 U. S., at 508–517; cf. *Imbler* v. *Pachtman*, *supra*, 424 U. S., at 430–431. But the Court also has refused to draw lines finer than history and reason would support. See, *e. g.*, *Spalding* v. *Vilas*, *supra*, 161 U. S., at 498 (privilege extends to all matters "committed by law to [an official's] control or supervision"); *Barr* v. *Matteo*, *supra*, 360 U. S., at 575 (fact "that the action here taken was within the outer perimeter of petitioner's line of duty is enough to render the privilege applicable. . . ."); *Stump* v. *Sparkman*, *supra*, 435 U. S., at 363 and n. 12 (judicial privilege applies even to acts occurring outside "the normal attributes of a judicial proceeding"). In view of the special nature of the President's constitutional office, we think it appropriate to extend to him absolute immunity from damage actions based on acts within the "outer perimeter" of the area of his official responsibility.

Under the Constitution and laws of the United States the President has discretionary responsibilities in a broad variety of areas, many of which are highly sensitive. In many cases it would be difficult to determine which Presidential "function" encompassed a particular action. In this case, for example, respondent argues that he was dismissed in retaliation for his testimony to Congress—a violation of 5 U. S. C. § 7211 and 18 U. S. C. § 1505. The Air Force, however, has claimed that the underlying reorganization was undertaken to promote efficiency. Assuming that the petitioner Nixon ordered the reorganization in which respondent lost his job, an inquiry into the President's motives could not be avoided under the "functional" theory asserted both by respondent and the dissent. Thus, in order to administer functional distinctions among Presidential actions, judges frequently would need to inquire into the purpose for which acts were taken. Inquiries of this kind could be highly intrusive.

Here respondent argues that petitioner Nixon would have acted outside the perimeter of his duties by ordering the discharge of respondent Fitzgerald, who was lawfully entitled to retain his job in the absence of "such cause as will promote the efficiency of the service." Brief for Respondent 39, citing 5 U. S. C. § 7512(a). Because Congress has granted this legislative protection, respondent argues, no federal official could, within his authority, cause Fitzgerald to be dismissed without satisfying this standard

generally have looked to the common law to determine the scope of an official's evidentiary privilege,[36] we have recognized that the Presidential privilege is "rooted in the separation of powers under the Constitution." *United States* v. *Nixon*, 418 U. S. 683, 708 (1974). It is settled law that the separation of powers doctrine does not bar every exercise of jurisdiction over the President of the United States. See, *e. g.*, *United States* v. *Nixon*, *supra*; *United States* v. *Burr*, 25 Fed. Cases 191, 196 (1807); cf. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952).[37] But our cases also have established that a court, before exercising jurisdiction, must balance the constitutional weight of the interest to be

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of proof in prescribed statutory proceedings.

This construction of the President's authority would subject him to trial on every allegation that an allegedly tortious action was taken for a forbidden purpose. Adoption of this construction thus would deprive absolute immunity of its intended effect.

It clearly is within the President's authority to "prescribe" the manner in which the Secretary will "conduct the business" of the Air Force. 10 U. S. C. § 8012(b). Because this mandate includes the authority to prescribe reorganizations and reductions in force, petitioner's alleged wrongful acts lay well within the outer perimeter of his authority.

[36] This tradition can be traced far back into our constitutional history. See, *e. g.*, *Mississippi* v. *Johnson*, 71 U. S. 475, 501 (1866), ("[W]e are fully satisfied that this court has no jurisidiction of a bill to enjoin the President in the performance of his official duties; and that no such bill ought to be received by us."); *Kendall* v. *United States*, 12 Pet. 524, 610 (1838) ("The executive power is vested in a President; and as far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeaching power.").

[37] See *United States* v. *Reynolds*, 345 U. S. 1, 6–7 (1953) (Secretary of the Air Force); *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 323–324 (DDC 1966), aff'd, 384 F. 2d 979 (CADC), cert denied, 389 U. S. 952 (1967) (Department of Justice officials).

[37] Although the President was not a party, the Court enjoined the Secretary of Commerce from executing a direct Presidential order. See 343 U. S., at 583.

served against the dangers of intrusion on the authority and functions of the Executive Branch. See *Nixon* v. *General Services Administration*, 433 U. S. 425, 443 (1977); *United States* v. *Nixon*, 418 U. S. 683, 703–713 (1974). When judicial action is needed to serve broad public interests—as when the Court acts, not in derogation of the separation of powers, but to maintain their proper balance, cf. *Youngstown Sheet & Tube Co.* v. *Sawyer*, *supra*, or to vindicate the public interest in an ongoing criminal prosecution, see *United States* v. *Nixon*, *supra*—the exercise of jurisdiction has been held warranted. In the case of this merely private suit for damages based on a President's official acts, we hold it is not.[38]

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[38] The Court has recognized before that there is a lesser public interest in actions for civil damages than, for example, in criminal prosecutions. See *United States* v. *Gillock*, 445 U. S. 360, 371–373 (1980); cf. *United States* v. *Nixon*, *supra*, 418 U. S., at 711–712 and n. 19 (basing holding on special importance of evidence in a criminal trial and distinguishing civil actions as raising different questions not presented for decision). It never has been denied that absolute immunity may impose a regrettable cost on individuals whose rights have been violated. But, contrary to the suggestion of the dissent, it is not true that our jurisprudence ordinarily supplies a remedy in civil damages for every legal wrong. The dissent's objections on this ground would weigh equally against absolute immunity for any official. Yet the dissent makes no attack on the absolute immunity recognized for judges and prosecutors.

Our implied-rights-of-action cases identify another area of the law in which there is not a damages remedy for every legal wrong. These cases establish that victims of statutory crimes ordinarily may not sue in federal court in the absence of expressed congressional intent to provide a damages remedy. See, *e. g.*, *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, —— U. S. —— (1982); *Middlesex County Sewerage Auth.* v. *National Sea Clammers Assn.*, 453 U. S. 1 (1981); *California* v. *Sierra Club*, 451 U. S. 287 (1981). The dissent does not refer to the jurisprudence of implied rights of action. Finally, the dissent undertakes no discussion of cases in the *Bivens* line in which this Court has suggested that that there would be no damages relief in circumstances "counselling hesitation" by the judiciary. See *Bivens* v. *Six Unknown Federal Agents*, *supra*, 403 U. S., at 396; *Carlson* v. *Green*, *supra*, 446 U. S., at 19 (in direct constitutional

V

A rule of absolute immunity for the President will not leave the Nation without sufficient protection against misconduct on the part of the chief executive.[39] There remains the constitutional remedy of impeachment.[40] In addition, there are formal and informal checks on Presidential action that do not apply with equal force to other executive officials. The President is subjected to constant scrutiny by the press. Vigilant oversight by Congress also may serve to deter Presidential abuses of office, as well as to make credible the threat of impeachment.[41] Other incentives to avoid miscon-

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actions against officials with "independent status in our constitutional scheme . . . judicially created remedies . . . might be inappropriate").

Even the case on which the dissent places principal reliance, *Marbury* v. *Madison*, 1 Cranch 137 (1803), provides dubious support at best. The dissent cites *Marbury* for the proposition that "The very essence of civil liberty consists in the right of the individual to claim the protection of the laws, whenever he receives an injury." *Id.*, at 163. Yet *Marbury* does not establish that the individual's protection must come in the form of a particular remedy. Marbury, it should be remembered, *lost* his case in the Supreme Court. The Court turned him away with the suggestion that he should have gone elsewhere with his claim. In this case it was clear at least that Fitzgerald was entitled to seek lost wages before the Civil Service Commission—a remedy of which he availed himself. See *supra*, at 4–6 and n. 17.

[39] The presence of alternative remedies has played an important role in our previous decisions in the area of official immunity. *E. g.*, *Imbler* v. *Pachtman*, *supra*, 424 U. S., at 428–429 ("We emphasize that the immunity of prosecutors from liability in suits under § 1983 does not leave the public powerless to deter misconduct or to punish that which occurs.").

[40] The same remedy plays a central role with respect to the misconduct of federal judges, who also possess absolute immunity. See Kaufman, Chilling Judicial Independence, 88 Yale L.J. 681, 690–706 (1979). Congressmen may be removed from office by a vote of their colleagues. U. S. Const., Art. I, § 5, cl. 2.

[41] Prior to petitioner Nixon's resignation from office, the House Judiciary Committee had convened impeachment hearings. See generally Report of the Committee on the Judiciary of the House of Representatives: Impeach-

duct may include a desire to earn re-election, the need to maintain prestige as an element of Presidential influence, and a President's traditional concern for his historical stature.

The existence of alternative remedies and deterrents establishes that absolute immunity will not place the President "above the law."[42] For the President, as for judges and prosecutors, absolute immunity merely precludes a particular private remedy for alleged misconduct in order to advance compelling public ends.

VI

For the reasons stated in this opinion, the decision of the Court of Appeals is reversed and the case remanded for action consistent with this opinion.

So ordered.

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ment of Richard M. Nixon President of the United States, H.R. Rep. No. 93–1305 (1974).

[42] The dissent's contrary argument that our decision places the President "above the law," *ante*, at 3–4, is rhetorically chilling but wholly unjustified. The remedy of impeachment demonstrates that the President remains accountable under law for his misdeeds in office. This case involves only a damages remedy. Although the President is not liable in civil damages for official misbehavior, that does not lift him "above" the law. The dissent does not suggest that a judge is "above" the law when he enters a judgment for which he cannot be held answerable in civil damages; or a prosecutor is above the law when he files an indictment; or a Congressman is above the law when he engages in legislative speech or debate. It is simple error to characterize an official as "above the law" because a particular remedy is not available against him.

Changes At
14, 16, 18, 19-21, 23-25

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

LFP

From: **Justice Powell**

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SUPREME COURT OF THE UNITED STATES

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No. 79-1738

RICHARD NIXON, PETITIONER *v.*
A. ERNEST FITZGERALD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June ——, 1982]

JUSTICE POWELL delivered the opinion of the Court.

The plaintiff in this lawsuit seeks relief in civil damages from a former President of the United States. The claim rests on actions allegedly taken in the former President's official capacity during his tenure in office. The issue before us is the scope of the immunity possessed by the President of the United States.

I

In January 1970 the respondent A. Ernest Fitzgerald lost his job as a management analyst with the Department of the Air Force. Fitzgerald's dismissal occurred in the context of a departmental reorganization and reduction in force, in which his job was eliminated. In announcing the reorganization, the Air Force characterized the action as taken to promote economy and efficiency in the armed forces.

Respondent's discharge attracted unusual attention in Congress and in the press. Fitzgerald had attained national prominence approximately one year earlier, during the waning months of the presidency of Lyndon B. Johnson. On November 13, 1968, Fitzgerald appeared before the Subcommittee on Economy in Government of the Joint Economic Committee of the United States Congress. To the apparent embarrassment of his superiors in the Department of De-

fense, Fitzgerald testified that cost-overruns on the C–5A transport plane could approximate $2 billion.[1] He also revealed that unexpected technical difficulties had arisen during the development of the aircraft.

Concerned that Fitzgerald might have suffered retaliation for his congressional testimony, the Subcommittee on Economy in Government convened public hearings on Fitzgerald's dismissal.[2] The press reported those hearings prominently, as it had the earlier announcement that his job was being eliminated by the Department of Defense. At a news conference on December 8, 1969, President Richard Nixon was queried about Fitzgerald's impending separation from government service.[3] The President responded by promising to

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[1] See *Economics of Military Procurement: Hearings Before the Subcommittee on Economy in Government of the Joint Economic Comm.*, 90th Cong., 2d Sess., Part I, at 199–201 (1968–1969). It is not disputed that officials in the Department of Defense were both embarrassed and angered by Fitzgerald's testimony. Within less than two months of respondent's congressional appearance, staff had prepared a memorandum for the outgoing Secretary of the Air Force, Harold Brown, listing three ways in which Fitzgerald might be removed from his position. See App. 209–211 (Memorandum of John Lang to Harold Brown, Jan. 6, 1969). Among these was a "reduction in force"—the means by which Fitzgerald ultimately was removed by Brown's successor in office under the new Nixon administration. The reduction in force was announced publicly on November 4, 1969, and Fitzgerald accordingly was separated from the Air Force upon the elimination of his job on January 5, 1970.

[2] See *The Dismissal of A. Ernest Fitzgerald by the Department of Defense: Hearings Before the Subcomm. on Economy in Government of the Joint Economic Comm.*, 91st Cong., 1st Sess. (1969). Some 60 Members of Congress also signed a letter to the President protesting the "firing of this dedicated public servant" as a "punitive action." *Id.*, at 115–116.

[3] A briefing memorandum on the Fitzgerald matter had been prepared by White House staff in anticipation of a possible inquiry at the forthcoming press conference. Authored by aide Patrick Buchanan, it advanced the view that the Air Force was "firing . . . a good public servant." App. 269 (Memorandum of Patrick Buchanan to Richard Nixon, December 5, 1969). The memorandum suggested that the President order Fitzgerald's

look into the matter.[4] Shortly after the news conference the petitioner asked White House Chief of Staff H.R. Haldeman to arrange for Fitzgerald's assignment to another job within the Administration.[5] It also appears that the President suggested to Budget Director Robert Mayo that Fitzgerald might be offered a position in the Bureau of the Budget.[6]

Fitzgerald's proposed reassignment encountered resistance within the Administration.[7] In an internal memorandum of January 20, 1970, White House aide Alexander Butterfield reported to Haldeman that "Fitzgerald is no doubt a top-notch cost expert, but he must be given very low marks in loyalty; and after all, loyalty is the name of the game."[8] Butterfield therefore recommended that "We should let him bleed, for a while at least."[9] There is no evidence of White

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retention by the Defense Department.

[4] App. 228.

[5] See App. 109–112 (Deposition of H.R. Haldeman); App. 137–141 (Deposition of petitioner Richard Nixon). Haldeman's deposed testimony was based on his handwritten notes of December 12, 1969. App. 275.

[6] See App. 126 (Deposition of Robert Mayo); App. 141 (Deposition of Richard Nixon).

[7] Both Mayo and his deputy, James Schlesinger, appear to have resisted at least partly due to a suspicion that Fitzgerald lacked institutional loyalty to Executive policies and that he spoke too freely in communications with friends on Capitol Hill. Both also stated that high level positions were presently unavailable within the Bureau of the Budget. See App. 126 (Deposition of Robert Mayo); App. 146–147 (Deposition of James Schlesinger).

[8] Quoted in *Decision on the Appeal of A. Ernest Fitzgerald* (*CSC Decision*), reprinted in App., at 60, 84 (September 18, 1973). (Page citations to the *CSC Decision* refer to the cited page in the Joint Appendix).

[9] *Id.*, at 85. The memorandum added that "We owe 'first choice on Fitzgerald' to [Senator] Proxmire and others who tried so hard to make him a hero [for exposing the cost overruns]." Suspicion of Fitzgerald's assumed loyalty toward Senator Proxmire was widely shared in the White House and in the Defense Department. According to the *CSC Decision*, *supra*: "While Mr. Fitzgerald has denied that he was 'Senator Proxmire's boy in the Air Force,' and he may honestly believe it, we find this statement difficult to accept. It is evident that the top officials in the Air Force, without

House efforts to reemploy Fitzgerald subsequent to the Butterfield memorandum.

Absent any offer of alternative federal employment, Fitzgerald complained to the Civil Service Commission. In a letter of January 20, 1970, he alleged that his separation represented unlawful retaliation for his truthful testimony before a congressional committee.[10] The Commission convened a closed hearing on Fitzgerald's allegations on May 4, 1971. Fitzgerald, however, preferred to present his grievances in public. After he had brought suit and won an injunction, *Fitzgerald* v. *Hampton*, 467 F. 2d 755 (CADC 1972), public hearings commenced on January 26, 1973. The hearings again generated publicity, much of it devoted to the testimony of Air Force Secretary Robert Seamans. Although he denied that Fitzgerald had lost his position in retaliation for congressional testimony, Seamans testified that he had received "some advice" from the White House before Fitzgerald's job was abolished.[11] But the Secretary declined to be more specific. He responded to several questions by invoking "executive privilege."[12]

At a news conference on January 31, 1973, the President was asked about Mr. Seamans' testimony. Mr. Nixon took the opportunity to assume personal responsibility for Fitzgerald's dismissal:

> "I was totally aware that Mr. Fitzgerald would be fired or discharged or asked to resign. I approved it and Mr. Seamans must have been talking to someone who had discussed the matter with me. No, this was

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specifically saying so, considered him to be just that. . . . We also note that upon leaving the Air Force Mr. Fitzgerald was employed as a consultant by the Proxmire Committee and that Senator Proxmire appeared at the Commission hearing as a character witness for [Fitzgerald]." App. 83.

[10] *Id.*, at 61.

[11] See *id.*, at 83–84.

[12] See *ibid.*

> not a case of some person down the line deciding he should go. It was a decision that was submitted to me. I made it and I stick by it."[13]

A day later, however, the White House press office issued a retraction of the President's statement. According to a press spokesman, the President had confused Fitzgerald with another former executive employee. On behalf of the President, the spokesman asserted that Mr. Nixon had not had "put before him the decision regarding Mr. Fitzgerald."[14]

After hearing over 4,000 pages of testimony, the Chief Examiner for the Civil Service Commission issued his decision in the Fitzgerald case on September 18, 1973. *Decision on the Appeal of A. Ernest Fitzgerald*, as reprinted in App., at 60. The Examiner held that Fitzgerald's dismissal had offended applicable civil service regulations. App. 86–87.[15] The Examiner based this conclusion on a finding that the departmental reorganization in which Fitzgerald lost his job,

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[13] App. 185. A few hours after the press conference, Mr. Nixon repeated privately to Presidential aide Charles Colson that he had ordered Fitzgerald's firing. App. 214–215 (recorded conversation of Jan. 31, 1973).

[14] App. 196 (transcription of statement of White House press secretary Ronald Ziegler, Feb. 1, 1973). In a conversation with aide John Ehrlichman, following his conversation with Charles Colson, see *supra* note 13, the President again had claimed responsibility for Fitzgerald's dismissal. When Ehrlichman corrected him on several details, however, the President concluded that he was "thinkin' of another case." App. 218 (recorded conversation of Jan. 31, 1973). See *id.*, at 220. It was after this conversation that the retraction was ordered.

[15] Fitzgerald's position in the Air Force was in the "excepted service" and therefore not covered by civil service rules and regulations for the competitive service. *Fitzgerald* v. *Hampton*, 467 F. 2d 755, 758 (CADC 1972); see *CSC Decision*, App., at 63–64. In *Hampton*, however, the court held that Fitzgerald's employment nonetheless was under "legislative protection," since he was a "preference eligible" veteran entitled to various statutory protections under the Veterans Preference Act. See 467 F. 2d, at 758–768. Among these were the benefits of the reduction in force procedures established by civil service regulation. See 467 F. 2d, at 758.

though purportedly implemented as an economy measure, was in fact motivated by "reasons purely personal to" respondent. *Id.*, at 86. As this was an impermissible basis for a reduction in force,[16] the Examiner recommended Fitzgerald's reappointment to his old position or to a job of comparable authority.[17] The Examiner, however, explicitly distinguished this narrow conclusion from a suggested finding that Fitzgerald had suffered retaliation for his testimony to Congress. As found by the Commission, "the evidence in the record does not support [Fitzgerald's] allegation that his position was abolished and that he was separated . . . in retaliation for his having revealed the C–5A cost overrun in testimony before the Proxmire Committee on November 13, 1968." *Id.*, at 81.

Following the Commission's decision, Fitzgerald filed a suit for damages in the United States District Court. In it he raised essentially the same claims presented to the Civil Service Commission.[18] As defendants he named eight offi-

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[16] The Examiner found that Fitzgerald in fact was dismissed because of his superiors' dissatisfaction with his job performance. App. 86–87. Their attitude was evidenced by "statements that he was not a 'team player' and 'not on the Air Force team.'" App. 83. Without deciding whether this would have been an adequate basis for an "adverse action" against Fitzgerald as an "inadequate or unsatisfactory employee," *id.*, at 86, the Examiner held that the Commission's adverse action procedures, current version codified at 5 CFR § 752, implicitly forbade the Air Force to employ a "reduction in force" as a means of dismissing respondent for reasons "personal to" him. App. 87.

[17] The Commission also ordered that Fitzgerald should receive back pay. App. 87–88. Despite the Commission's order, respondent avers that he "has still not obtained reinstatement to a position equivalent to his former one," Brief for Respondent, at 11, n. 17, and that he therefore has brought an enforcement action in the District Court.

[18] The complaint alleged a continuing conspiracy to deprive him of his job, to deny him reemployment, and to besmirch his reputation. Fitzgerald alleged that the conspiracy had continued through the Commission hearings and remained in existence at the initiation of the lawsuit. See *Fitzgerald* v. *Seamans*, 384 F. Supp. 688, 690–692 (DC 1974).

cials of the Defense Department, White House aide Alexander Butterfield, and "one or More" unnamed "White House Aides" styled only as "John Does."

The District Court dismissed the action under the District of Columbia's three-year statute of limitations, *Fitzgerald* v. *Seamans*, 384 F. Supp. 688 (D.D.C. 1974), and the Court of Appeals affirmed as to all but one defendant, White House aide Alexander Butterfield, *Fitzgerald* v. *Seamans*, 553 F. 2d 220 (CADC 1977). The Court of Appeals reasoned that Fitzgerald had no reason to suspect White House involvement in his dimissal at least until 1973. In that year, reasonable grounds for suspicion had arisen, most notably through publication of the internal White House memorandum in which Butterfield had recommended that Fitzgerald at least should be made to "bleed for a while" before being offered another job in the Administration. *Id.*, at 225, 229. Holding that concealment of illegal activity would toll the statute of limitations, the Court of Appeals remanded the action against Butterfield for further proceedings in the District Court.

Following the remand and extensive discovery thereafter, Fitzgerald filed a Second Amended Complaint in the District Court on July 5, 1978. It was in this amended complaint—more than eight years after he had complained of his discharge to the Civil Service Commission—that Fitzgerald first named the petitioner Nixon as a party defendant.[19] Also included as defendants were White House aide Bryce Harlow and other officials of the Nixon administration. Additional discovery ensued. By March 1980, only three defendants remained: the petitioner Richard Nixon and White House aides

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[19]The general allegations of the complaint remained essentially unchanged. In averring Nixon's participation in the alleged conspiracy against him, the complaint quoted petitioner's press conference statement that he was "totally aware" of and in fact "approved" Fitzgerald's dismissal. Second Amended Complaint 6.

Harlow and Butterfield. Denying a motion for summary judgment, the District Court ruled that the action must proceed to trial. Its order of March 26 held that Fitzgerald had stated triable causes of action under two federal statutes and the First Amendment to the Constitution.[2] The Court also ruled that petitioner was not entitled to claim absolute presidential immunity.

Petitioner took a collateral appeal of the immunity decision to the Court of Appeals for the District of Columbia Circuit. The Court of Appeals dismissed summarily. It apparently did so on the ground that its recent decision in *Halperin* v. *Kissinger*, 606 F. 2d 1192 (CADC 1979), aff'd by an equally divided vote, 452 U. S. 713 (1981), had rejected this claimed immunity defense.

As this Court has not ruled on the scope of immunity available to a President of the United States, we granted certiorari to decide this important issue. 452 U. S. 957 (1981).

II

Before addressing the merits of this case, we must consider two challenges to our jurisdiction. In his opposition to

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[2] See Cert. App. 1–2. The District Court held that respondent was entitled to "infer" a cause of action under 5 U. S. C. § 7211 and 18 U. S. C. § 1505. Neither expressly confers a private right to sue for relief in damages. The first, 5 U. S. C. § 7211 (Supp. III 1979), provides generally that "The right of employees . . . to . . . furnish information to either House of Congress, or to a committee or a Member thereof, may not be interfered with or denied." The second, 18 U. S. C. § 1505, is a criminal statute making it a crime to obstruct congressional testimony. The correctness of the decision that a cause of action could be "implied" under these statutes is not currently before us. As explained *infra*, this case is here under the "collateral order" doctrine, for review of the District Court's denial of petitioner's motion to dismiss on the ground that he enjoyed absolute immunity from civil suit. The District Court also held that respondent had stated a claim under the common law of the District of Columbia, but respondent subsequently abandoned his common law cause of action. See Supplemental Brief for Respondent 2 (May 14, 1980).

the petition for certiorari, respondent argued that this Court is without jurisdiction to review the non-final order in which the District Court rejected petitioner's claim to absolute immunity.[21] We also must consider an argument that an agreement between the parties has mooted the controversy.

A

Petitioner invokes the jurisdiction of this Court under 28 U. S. C. § 1254, a statute that invests us with authority to review "[c]ases in" the courts of appeals.[22] When the petitioner in this case sought review of an interlocutory order denying his claim to absolute immunity, the Court of Appeals dismissed the appeal for lack of jurisdiction. Emphasizing the "jurisdictional" basis for the Court of Appeals' decision, respondent argued that the District Court's order was not an appealable "case" properly "in" the Court of Appeals within the meaning of § 1254. We do not agree.

Under the "collateral order" doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949), a small class of interlocutory orders are immediately appealable to the courts of appeals. As defined by *Cohen*, this class embraces orders that "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and [are] effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 468 (1978); see *Cohen*, *supra*, 337 U. S., at 546–547. As an additional requirement,

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[21] See Brief for Respondent in Opposition 2. Although Fitzgerald has not continued to urge this argument, the challenge was jurisdictional, and we therefore address it.

[22] The statute provides in pertinent part:

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. . . .

28 U. S. C. § 1254.

Cohen established that a collateral appeal of an interlocutory order must "present[] a serious and unsettled question." 337 U. S., at 547. At least twice before this Court has held that orders denying claims of absolute immunity are appealable under the *Cohen* criteria. See *Helstoski* v. *Meanor*, 442 U. S. 500 (1979) (claim of immunity under the Speech and Debate Clause); *Abney* v. *United States*, 431 U. S. 651 (1977) (claim of immunity under Double Jeopardy Clause). In previous cases the Court of Appeals for the District of Columbia Circuit also has treated orders denying absolute immunity as appealable under *Cohen*. See *Briggs* v. *Goodwin*, 569 F. 2d 10, 58–60 (CADC 1977) (Wilkey, J., writing separately for the Court on the appealability issue); *McSurely* v. *McClellan*, 521 F. 2d 1024, 1032 (1975), aff'd in pertinent part en banc, 553 F. 2d 1277, 1283–1284 n. 18 (1976), cert dismissed *sub nom. McAdams* v. *McSurely*, 438 U. S. 189 (1978).

In "dismissing" the appeal in this case, the Court of Appeals appears to have reasoned that petitioner's appeal lay outside the *Cohen* doctrine because it raised no "serious and unsettled question" of law. This argument was pressed by the respondent, who asked the Court of Appeals to dismiss on the basis of that court's "controlling" decision in *Halperin* v. *Kissinger*, *supra*.

Under the circumstances of this case, we cannot agree that petitioner's interlocutory appeal failed to raise a "serious and unsettled" question. Although the Court of Appeals had ruled in *Halperin* v. *Kissinger* that the President was not entitled to absolute immunity, this Court never had so held. And a petition for certiorari in *Halperin* was pending in this Court at the time petitioner's appeal was dismissed. In light of the special solicitude due to claims alleging a threatened breach of essential Presidential prerogatives under the separation of powers, see *United States* v. *Nixon*, 418 U. S. 683, 691–692 (1974), we conclude that petitioner did present a "serious and unsettled" and therefore appealable question to the Court of Appeals. It follows that the case was "in" the

Court of Appeals under § 1254 and properly within our certiorari jurisdiction.[23]

B

Shortly after petitioner had filed his petition for ceriorari in this Court and respondent had entered his opposition, the parties reached an agreement to liquidate damages.[24] Under its terms the petitioner Nixon paid the respondent Fitzgerald a sum of $142,000. In consideration Fitzgerald agreed to accept liquidated damages of $28,000 in the event of a ruling by this Court that petitioner was not entitled to absolute immunity. In case of a decision upholding petitioner's immunity claim, no further payments would be made.

The limited agreement between the parties left both petitioner and respondent with a considerable financial stake in the resolution of the question presented in this Court. As we recently concluded in a case involving a similar contract, "Given respondents' continued active pursuit of monetary re-

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[23] There can be no serious doubt concerning our power to review a court of appeals' decision to dismiss for lack of jurisdiction—a power we have exercised routinely. See, *e. g.*, *Gardner* v. *Westinghouse Broadcasting Co.*, 437 U. S. 478 (1978). If we lacked authority to do so, decisions to dismiss for want of jurisdiction would be insulated entirely from review by this Court.

Nor, now that we have taken jurisdiction of the case, need we remand to the Court of Appeals for a decision on the merits. The immunity question is a pure issue of law, appropriate for our immediate resolution. Especially in light of the Court of Appeals' now-binding decision of the issue presented, concerns of judicial economy fully warrant our decision of the important question presented.

[24] Respondent filed a copy of this agreement with the Clerk of this Court on August 24, 1981, as an appendix to his Brief in Opposition to a Motion of Morton, Ina, David, Mark and Gary Halperin to Intervene and for Other Relief. On June 10, 1980, prior to the Court's action on the petition for certiorari, counsel to the parties had advised the Court that their clients had reached an agreement to liquidate damages, but that there remained a live controversy. Counsel did not include a copy of the agreement in their initial submission.

lief, this case remains 'definite and concrete, touching the legal relations of parties having adverse legal interests.'" *Havens Realty Co.* v. *Coleman*, —— U. S. ——, —— (1982), quoting *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240–241 (1937).

III

A

This Court consistently has recognized that government officials are entitled to some form of immunity from suits for civil damages. In *Spalding* v. *Vilas*, 161 U. S. 483 (1896), the Court considered the immunity available to the Postmaster General in a suit for damages based upon his official acts. Drawing upon principles of immunity developed in English cases at common law, the Court concluded that "[t]he interests of the people" required a grant of absolute immunity to public officers. *Id.*, at 498. In the absence of immunity, the Court reasoned, executive officials would hesitate to exercise their discretion in a way "injuriously affect[ing] the claims of particular individuals," *id.*, at 499, even when the public interest required bold and unhesitating action. Considerations of "public policy and convenience" therefore compelled a judicial recognition of immunity from suits arising from official acts.

> "In exercising the functions of his office, the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government, if he were subjected to any such restraint." *Id.*, at 498.

Decisions subsequent to *Spalding* have extended the de-

fense of immunity to actions besides those at common law. In *Tenney* v. *Brandhove*, 341 U. S. 367 (1951), the Court considered whether the passage of 42 U. S. C. § 1983, which made no express provision for immunity for any official, had abrogated the privilege accorded to state legislators at common law. *Tenney* held that it had not. Examining § 1983 in light of the "presuppositions of our political history" and our heritage of legislative freedom, the Court found it incredible "that Congress . . . would impinge on a tradition so well grounded in history and reason" without some indication of intent more explicit than the general language of the statute. *Id.*, at 376. Similarly, the decision in *Pierson* v. *Ray*, 386 U. S. 547 (1967), involving a § 1983 suit against a state judge, recognized the continued validity of the absolute immunity of judges for acts within the judicial role. This was a doctrine "'not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.'" *Id.*, at 554, quoting, *Scott* v. *Stansfield*, L.R. 3 Ex. 220, 223 (1868). See *Bradley* v. *Fisher*, 13 Wall. 335 (1872). The Court in *Pierson* also held that police officers are entitled to a qualified immunity protecting them from suit when their official acts are performed in "good faith." *Id.*, at 557.

In *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974), the Court considered the immunity available to state executive officials in a § 1983 suit alleging the violation of constitutional rights. In that case we rejected the officials' claim to absolute immunity under the doctrine of *Spalding* v. *Vilas*, finding instead that state executive officials possessed a "good faith" immunity from § 1983 suits alleging constitutional violations. Balancing the purposes of § 1983 against the imperatives of public policy, the Court held that "in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of

discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based." 416 U. S., at 247.

As construed by subsequent cases, *Scheuer* established a two-tiered division of immunity defenses in § 1983 suits. To most executive officers *Scheuer* accorded qualified immunity. For them the scope of the defense varied in proportion to the nature of their official functions and the range of decisions that conceivably might be taken in "good faith". This "functional" approach also defined a second tier, however, at which the especially sensitive duties of certain officials—notably judges and prosecutors—required the continued recognition of absolute immunity. See, *e. g.*, *Imbler* v. *Pachtman*, 424 U. S. 409 (1976) (state prosecutors possess absolute immunity with respect to the initiation and pursuit of prosecutions); *Stump* v. *Sparkman*, 435 U. S. 349 (1978) (state judge possesses absolute immunity for all judicial acts).

This approach was reviewed in detail in *Butz* v. *Economou*, 438 U. S. 478 (1978), when we considered for the first time the kind of immunity possessed by *federal* executive officials who are sued for constitutional violations.[25] In *Butz* the Court rejected an argument, based on decisions involving federal officials charged with common law torts, that all high federal officials have a right to absolute immunity from constitutional damage actions. Concluding that a blanket recognition of absolute immunity would be anomalous in light of the qualified immunity standard applied to state executive officials, 438 U. S., at 504, we held that federal officials generally have the same qualified immunity possessed by state officials in cases under § 1983. In so doing we reaffirmed our holdings that some officials, notably judges and prosecutors,

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[25] *Spalding* v. *Vilas*, 161 U. S. 483 (1896), was distinguished on the ground that the suit against the Postmaster General had asserted a common law—and not a constitutional—cause of action. See *Butz*, v. *Economou*, 438 U. S. 478, 493–495 (1978).

"because of the special nature of their responsibilities," *id.*, at 511, "require a full exemption from liability." *Id.*, at 508. In *Butz* itself we upheld a claim of absolute immunity for administrative officials engaged in functions analogous to those of judges and prosecutors. *Ibid.* We also left open the question whether other federal officials could show that "public policy requires an exemption of that scope." *Id.*, at 506.

B

Our decisions concerning the immunity of government officials from civil damages liability have been guided by the Constitution, federal statutes, and history. Additionally, at least in the absence of explicit constitutional or congressional guidance, our immunity decisions have been informed by the common law. See *Butz* v. *Economou*, *supra*, at 508; *Imbler* v. *Pachtman*, 424 U. S. 409, 421 (1976). This Court necessarily also has weighed concerns of public policy, especially as illuminated by our history and the structure of our government. See, *e. g.*, *Butz* v. *Economou*, *supra*, at 508; *Imbler* v. *Pachtman*, *supra*, at 421; *Spalding* v. *Vilas*, *supra*, at 498.[28]

This case now presents the claim that the President of the United States is shielded by absolute immunity from civil damages liability. In the case of the President the inquiries into history and policy, though mandated independently by our cases, tend to converge. Because the Presidency did not exist through most of the development of common law, any historical analysis must draw its evidence primarily from our constitutional heritage and structure. Historical inquiry thus merges almost at its inception with the kind of "public policy" analysis appropriately undertaken by a federal court.

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[28] Although the Court in *Butz* v. *Economou*, *supra*, at 508, described the requisite inquiry as one of "public policy," the focus of inquiry more accurately may be viewed in terms of the "inherent" or "structural" assumptions of our scheme of government.

16-A

A congressional ttempt to impose ~~such~~ a damage liability would present a serious constitutional issue that we have no occasion o consider in this case.

This inquiry involves policies and principles that may be considered implicit in the nature of the President's office in a system structured to achieve effective government under a constitutionally mandated separation of powers.

IV

Here a former President asserts his immunity from civil damages claims of two kinds. He stands named as a defendant in a direct action under the Constitution and in two statutory actions under federal laws of general applicability. In neither case has Congress taken express legislative action to subject the President to civil liability for his official acts.[27]

Applying the principles of our cases to claims of this kind, we hold that petitioner, as a former President of the United States, is entitled to absolute immunity from damages liability predicated on his official acts. We consider this immunity a functionally mandated incident of the President's

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[27] In the present case we therefore are presented only with "implied" causes of action, and we need not address directly the immunity question as it would arise if Congress expressly had created a damages action against the President of the United States. This approach accords with this Court's settled policy of avoiding unnecessary decision of constitutional issues. Reviewing this case under the "collateral order" doctrine, see *supra*, we assume for purposes of this opinion that private causes of action may be inferred both under the First Amendment and the two statutes on which respondent relies. But it does not follow that we must—in considering a *Bivens* remedy or interpreting a statute *in light of the immunity doctrine*—assume that the cause of action runs against the President of the United States. *Cf. Tenney* v. *Brandhove*, 341 U. S. 367, 376 (1951) (construing § 1983 in light of the immunity doctrine, the Court could not accept "that Congress . . . would impinge on a tradition [of legislative immunity] so well grounded in history and reason by convert inclusion in the general language before us," and therefore would not address issues that would arise if Congress had undertaken to deprive state legislators of absolute immunity). Consequently, our holding today need only be that the President is absolutely immune from civil damages liability in the absence of explicit affirmative action by Congress. We decide only this constitutional issue, which is necessary to disposition of the case before us.

unique office, rooted in the constitutional tradition of the separation of powers and supported by our history. Justice Story's analysis remains persuasive:

> "There are . . . incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions, which are confided to it. Among these, must necessarily be included the power to perform them . . . . The president cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability." J. Story, Commentaries on the Constitution of the United States, § 1563, at 418–419 (1833 ed.).

A

The President occupies a unique position in the constitutional scheme. Article II of the Constitution provides that "[t]he executive Power shall be vested in a President of the United States. . . ." This grant of authority establishes the President as the chief constitutional officer of the Executive Branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity. These include the enforcement of federal law—it is the President who is charged constitutionally to "take care that the laws be faithfully executed";[28] the conduct of foreign affairs—a realm in which the Court has recognized that "[i]t would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret";[29] and management of the Executive Branch—a task for which "imperative reasons requir[e] an unrestricted power [in the President] to remove

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[28] U. S. Const., Art II, § 3.

[29] *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U. S. 103, 111 (1948).

the most important of his subordinates in their most important duties."[30]

In arguing that the President is entitled only to qualified immunity, the respondent relies on cases in which we have recognized immunity of this scope for governors and cabinet officers. *E. g.*, *Butz* v. *Economou*, 438 U. S. 478; *Scheuer* v. *Rhodes*, 416 U. S. 232. We find these cases to be inapposite. The President's unique status under the Constitution distinguishes him from other executive officials.[31]

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[30] *Myers* v. *United States*, 272 U. S. 52, 134–135 (1926).

[31] Noting that the "Speech and Debate Clause" provides a textual basis for congressional immunity, respondent argues that the Framers must be assumed to have rejected any similar grant of Executive immunity. This argument is unpersuasive. First, a specific textual basis has not been considered a prerequisite to the recognition of immunity. No provision expressly confers judicial immunity. Yet the immunity of judges is well settled. See, *e. g.*, *Bradley* v. *Fisher*, 13 Wall 335 (1872); *Stump* v. *Sparkman*, *supra*. Second, this Court already has established that absolute immunity may be extended to certain officials of the Executive Branch. *Butz* v. *Economou*, *supra*, 438 U. S., at 511–512; see *Imbler* v. *Pachtman*, *supra* (extending immunity to prosecutorial officials within the Executive Branch). Third, there is historical evidence from which it may be inferred that the Framers assumed the President's immunity from damages liability. At the Constitutional Convention several delegates expressed concern that subjecting the President even to impeachment would impair his capacity to perform his duties of office. See 2 M. Farrand, Records of the Constitutional Convention of 1787 (1934), at 64 (remarks of Gouvernor Morris); *id.*, at 66 (remarks of Charles Pinckney). The delegates of course did agree to an Impeachment Clause. But nothing in their debates suggests an expectation that the President would be subjected to the distraction of suits by disappointed private citizens. Senator Maclay has recorded the views of Senator Ellsworth and Vice-President John Adams—both delegates to the Convention—that "the President, personally, was not subject to any process whatever. . . . For [that] would put it in the power of a common justice to exercise any authority over him, and stop the whole machine of government." W. Maclay, Journal of W. Maclay 167 (E. Maclay ed. 1890). And Justice Story, writing in 1833, held it implicit in the separation of powers that the President must be permitted to discharge his duties undistracted by private lawsuits. J. Story, Commentaries on

Because of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government. As is the case with prosecutors and judges—

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the Constitution of the United States, § 1563, at 418–419 (1833 ed.) (quoted *supra*).

Thomas Jefferson also argued that the President was not subject to judicial process. When Chief Justice Marshall held in *United States* v. *Burr*, 25 Fed. Cas. 30 (1807), that a subpoena duces tecum can be issued to a President, Jefferson protested strongly, and stated his broader view of the proper relationship between the Judiciary and the President:

"The leading principle of our Constitution is the independence of the Legislature, executive and judiciary of each other, and none are more jealous of this than the judiciary. But would the executive be independent of the judiciary, if he were subject to the *commands* of the latter, & to imprisonment for disobedience; if the several courts could bandy him from pillar to post, keep him constantly trudging from north to south & east to west, and withdraw him entirely from his constitutional duties? The intention of the Constitution, that each branch should be independent of the others, is further manifested by the means it has furnished to each, to protect itself from enterprises of force attempted on them by the others, and to none has it given more effectual or diversified means than to the executive." 10 The Works of Thomas Jefferson 404. (P. Ford ed. 1905) (quoting a letter from President Jefferson to a prosecutor at the Burr trial) (emphasis in the original). See also 5 D. Malone, Jefferson and His Time: Jefferson the President 320–325 (1974).

JUSTICE WHITE's dissent intimates that the significance of this historical evidence somehow is minimized by its location in a footnote, rather than in text. See, *post*, at 6 n. 2, and at 15. We had not supposed that the merit either of argument or of documentation depends upon its location in a Court opinion. In light of the fragmentary character of the most important materials reflecting the Framers' intent, we do think that the most compelling arguments arise from the Constitution's separation of powers and the judiciary's historic understanding of that doctrine. See text *supra*. But our primary reliance on constitutional structure and judicial precedent should not be misunderstood. The best historical evidence clearly supports the Presidential immunity we have upheld. Justice White's dissent cites some other materials, including ambiguous comments made at state ratifying conventions and the remarks of a single publicist. But historical evidence must be weighed as well as cited. When the

for whom absolute immunity now is established—a President must concern himself with matters likely to "arouse the most intense feelings." *Pierson* v. *Ray*, *supra*, 386 U. S., at 554. Yet, as our decisions have recognized, it is in precisely such cases that there exists the greatest public interest in providing an official "the maximum ability to deal fearlessly and impartially with" the duties of his office. *Ferri* v. *Ackerman*, 444 U. S. 193, 203 (1979) (footnote omitted). This concern is compelling where the officeholder must make the most sensitive and far-reaching decisions entrusted to any official under our constitutional system.[32] Nor can the sheer prominence of the President's office be ignored. In view of the visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for suits for civil damages.[33] Cognizance of this personal vulnerability frequently could distract a President from his public duties, to the detriment not only of the President and his office but also the nation that the Presidency was designed to serve.[34]

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weight of evidence is considered, we think we must place our reliance on the contemporary understanding of John Adams, Thomas Jefferson, and Oliver Ellsworth. Other powerful support derives from the actual history of private lawsuits against the President. Prior to the litigation explosion commencing with this Court's 1971 *Bivens* decision, fewer than a handful of damages action ever were filed against the President. None appears to have proceeded to judgment on the merits.

[32] Among the most persuasive reasons supporting official immunity is the prospect that damages liability may render an official unduly cautious in the discharge of his official duties. As Judge Learned Hand wrote in *Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (CA2 1949), cert denied, 339 U. S. 949 (1950), "[t]he justification for . . . [denying recovery] is that it is impossible to know whether the claim is well founded until the case has been tried, and to submit all officials, the innocent as well as the guilty, to the burden of trial and the danger of its outcome would dampen the ardor of all but the most resolute. . . ."

[33] These dangers are significant even though there is no historical record of numerous suits against the President, since a right to sue federal officials for damages for constitutional violations was not even recognized until *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971).

[34] In defining the scope of an official's absolute privilege, this Court has

B

Courts traditionally have recognized the President's constitutional responsibilities and status as factors counselling judicial deference and restraint.[35] For example, while courts

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recognized that the sphere of protected action must be related closely to the immunity's justifying purposes. Frequently our decisions have held that an official's absolute immunity should extend only to acts in performance of particular functions. See *Butz* v. *Economou*, 438 U. S., at 508–517; cf. *Imbler* v. *Pachtman*, 424 U. S., at 430–431. But the Court also has refused to draw lines finer than history and reason would support. See, *e. g.*, *Spalding* v. *Vilas*, 161 U. S., at 498 (privilege extends to all matters "committed by law to [an official's] control or supervision"); *Barr* v. *Matteo*, 360 U. S., at 576 (fact "that the action here taken was within the outer perimeter of petitioner's line of duty is enough to render the privilege applicable. . . ."); *Stump* v. *Sparkman*, 435 U. S., at 363 and n. 12 (judicial privilege applies even to acts occurring outside "the normal attributes of a judicial proceeding"). In view of the special nature of the President's constitutional office, we think it appropriate to extend to him absolute immunity from damage actions based on acts within the "outer perimeter" of the area of his official responsibility.

Under the Constitution and laws of the United States the President has discretionary responsibilities in a broad variety of areas, many of which are highly sensitive. In many cases it would be difficult to determine which Presidential "function" encompassed a particular action. In this case, for example, respondent argues that he was dismissed in retaliation for his testimony to Congress—a violation of 5 U. S. C. § 7211 and 18 U. S. C. § 1505. The Air Force, however, has claimed that the underlying reorganization was undertaken to promote efficiency. Assuming that the petitioner Nixon ordered the reorganization in which respondent lost his job, an inquiry into the President's motives could not be avoided under the "functional" theory asserted both by respondent and the dissent. Thus, in order to administer functional distinctions among Presidential actions, judges frequently would need to inquire into the purpose for which acts were taken. Inquiries of this kind could be highly intrusive.

Here respondent argues that petitioner Nixon would have acted outside the perimeter of his duties by ordering the discharge of respondent Fitzgerald, who was lawfully entitled to retain his job in the absence of "such cause as will promote the efficiency of the service." Brief for Respondent 39, citing 5 U. S. C. § 7512(a). Because Congress has granted this legislative protection, respondent argues, no federal official could, within his authority, cause Fitzgerald to be dismissed without satisfying this standard

generally have looked to the common law to determine the scope of an official's evidentiary privilege,[36] we have recognized that the Presidential privilege is "rooted in the separation of powers under the Constitution." *United States* v. *Nixon*, 418 U. S. 683, 708 (1974). It is settled law that the separation of powers doctrine does not bar every exercise of jurisdiction over the President of the United States. See, *e. g.*, *United States* v. *Nixon*, *supra*; *United States* v. *Burr*, 25 Fed. Cases 191, 196 (1807); cf. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952).[37] But our cases also have established that a court, before exercising jurisdiction, must balance the constitutional weight of the interest to be

of proof in prescribed statutory proceedings.

This construction of the President's authority would subject him to trial on every allegation that an allegedly tortious action was taken for a forbidden purpose. Adoption of this construction thus would deprive absolute immunity of its intended effect.

It clearly is within the President's authority to "prescribe" the manner in which the Secretary will "conduct the business" of the Air Force. 10 U. S. C. § 8012(b). Because this mandate includes the authority to prescribe reorganizations and reductions in force, petitioner's alleged wrongful acts lay well within the outer perimeter of his authority.

[36] This tradition can be traced far back into our constitutional history. See, *e. g.*, *Mississippi* v. *Johnson*, 71 U. S. 475, 501 (1866), ("[W]e are fully satisfied that this court has no jurisidiction of a bill to enjoin the President in the performance of his official duties; and that no such bill ought to be received by us."); *Kendall* v. *United States*, 12 Pet. 524, 610 (1838) ("The executive power is vested in a President; and as far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeaching power.").

[37] See *United States* v. *Reynolds*, 345 U. S. 1, 6–7 (1953) (Secretary of the Air Force); *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 323–324 (DDC 1966), aff'd, 384 F. 2d 979 (CADC), cert denied, 389 U. S. 952 (1967) (Department of Justice officials).

[37] Although the President was not a party, the Court enjoined the Secretary of Commerce from executing a direct Presidential order. See 343 U. S., at 583.

served against the dangers of intrusion on the authority and functions of the Executive Branch. See *Nixon* v. *General Services Administration*, 433 U. S. 425, 443 (1977); *United States* v. *Nixon*, 418 U. S. 683, 703–713 (1974). When judicial action is needed to serve broad public interests—as when the Court acts, not in derogation of the separation of powers, but to maintain their proper balance, cf. *Youngstown Sheet & Tube Co.* v. *Sawyer*, *supra*, or to vindicate the public interest in an ongoing criminal prosecution, see *United States* v. *Nixon*, *supra*—the exercise of jurisdiction has been held warranted. In the case of this merely private suit for damages based on a President's official acts, we hold it is not.[32]

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[32] The Court has recognized before that there is a lesser public interest in actions for civil damages than, for example, in criminal prosecutions. See *United States* v. *Gillock*, 445 U. S. 360, 371–373 (1980); cf. *United States* v. *Nixon*, 418 U. S., at 711–712 and n. 19 (basing holding on special importance of evidence in a criminal trial and distinguishing civil actions as raising different questions not presented for decision). It never has been denied that absolute immunity may impose a regrettable cost on individuals whose rights have been violated. But, contrary to the suggestion of JUSTICE WHITE's dissent, it is not true that our jurisprudence ordinarily supplies a remedy in civil damages for every legal wrong. The dissent's objections on this ground would weigh equally against absolute immunity for any official. Yet the dissent makes no attack on the absolute immunity recognized for judges and prosecutors.

Our implied-rights-of-action cases identify another area of the law in which there is not a damages remedy for every legal wrong. These cases establish that victims of statutory crimes ordinarily may not sue in federal court in the absence of expressed congressional intent to provide a damages remedy. See, *e. g.*, *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, —— U. S. —— (1982); *Middlesex County Sewerage Auth.* v. *National Sea Clammers Assn.*, 453 U. S. 1 (1981); *California* v. *Sierra Club*, 451 U. S. 287 (1981). JUSTICE WHITE does not refer to the jurisprudence of implied rights of action. Finally, the dissent undertakes no discussion of cases in the *Bivens* line in which this Court has suggested that that there would be no damages relief in circumstances "counselling hesitation" by the judiciary. See *Bivens* v. *Six Unknown Federal Agents*, 403 U. S., at 396; *Carlson* v. *Green*, 446 U. S., at 19 (in direct constitutional actions against officials with "independent status in our constitutional scheme . . . judi-

V

A rule of absolute immunity for the President will not leave the Nation without sufficient protection against misconduct on the part of the chief executive.[39] There remains the constitutional remedy of impeachment.[40] In addition, there are formal and informal checks on Presidential action that do not apply with equal force to other executive officials. The President is subjected to constant scrutiny by the press. Vigilant oversight by Congress also may serve to deter Presidential abuses of office, as well as to make credible the threat of impeachment.[41] Other incentives to avoid miscon-

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cially created remedies . . . might be inappropriate").

Even the case on which JUSTICE WHITE places principal reliance, *Marbury* v. *Madison*, 1 Cranch 137 (1803), provides dubious support at best. The dissent cites *Marbury* for the proposition that "The very essence of civil liberty consists in the right of the individual to claim the protection of the laws, whenever he receives an injury." *Id.*, at 163. Yet *Marbury* does not establish that the individual's protection must come in the form of a particular remedy. Marbury, it should be remembered, *lost* his case in the Supreme Court. The Court turned him away with the suggestion that he should have gone elsewhere with his claim. In this case it was clear at least that Fitzgerald was entitled to seek lost wages before the Civil Service Commission—a remedy of which he availed himself. See *supra*, at 4–6 and n. 17.

[39] The presence of alternative remedies has played an important role in our previous decisions in the area of official immunity. *E. g.*, *Imbler* v. *Pachtman*, 424 U. S., at 428–429 ("We emphasize that the immunity of prosecutors from liability in suits under § 1983 does not leave the public powerless to deter misconduct or to punish that which occurs.").

[40] The same remedy plays a central role with respect to the misconduct of federal judges, who also possess absolute immunity. See Kaufman, Chilling Judicial Independence, 88 Yale L.J. 681, 690–706 (1979). Congressmen may be removed from office by a vote of their colleagues. U. S. Const., Art. I, § 5, cl. 2.

[41] Prior to petitioner Nixon's resignation from office, the House Judiciary Committee had convened impeachment hearings. See generally Report of the Committee on the Judiciary of the House of Representatives: Impeachment of Richard M. Nixon President of the United States, H.R. Rep. No.

duct may include a desire to earn re-election, the need to maintain prestige as an element of Presidential influence, and a President's traditional concern for his historical stature.

The existence of alternative remedies and deterrents establishes that absolute immunity will not place the President "above the law."[42] For the President, as for judges and prosecutors, absolute immunity merely precludes a particular private remedy for alleged misconduct in order to advance compelling public ends.

VI

...stated in this opinion, the decision of the ...

lfp/ss 06/10/82 Rider A, p. (Nixon)

N SALLY-POW

The dissent, reaching for authority to support its position, cites a current edition of Time magazine to the effect that "no President is above the law". ^1 With due respect to this prominent publication, we have not heretofore considered it a citable authority in a Court opinion on constitutional law. Nor indeed was the magazine article referring at all to private damage suit liability. Rather, its statement reflected the judgment of this Court in the Nixon tapes case and the impreachment resolution of the House Judiciary Committee.

Post, n 2, p 4.

1, 16, 19 Stylistic Changes Throughout

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: _____

JUN 10 1982

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5
6th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1738

RICHARD NIXON, PETITIONER *v.*
A. ERNEST FITZGERALD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June ——, 1982]

JUSTICE POWELL delivered the opinion of the Court.

The plaintiff in this lawsuit seeks relief in civil damages from a former President of the United States. The claim rests on actions allegedly taken in the former President's official capacity during his tenure in office. The issue before us is the scope of the immunity possessed by the President of the United States.

I

In January 1970 the respondent A. Ernest Fitzgerald lost his job as a management analyst with the Department of the Air Force. Fitzgerald's dismissal occurred in the context of a departmental reorganization and reduction in force, in which his job was eliminated. In announcing the reorganization, the Air Force characterized the action as taken to promote economy and efficiency in the armed forces.

Respondent's discharge attracted unusual attention in Congress and in the press. Fitzgerald had attained national prominence approximately one year earlier, during the waning months of the presidency of Lyndon B. Johnson. On November 13, 1968, Fitzgerald appeared before the Subcommittee on Economy in Government of the Joint Economic Committee of the United States Congress. To the apparent embarrassment of his superiors in the Department of De-

fense, Fitzgerald testified that cost-overruns on the C–5A transport plane could approximate $2 billion.[1] He also revealed that unexpected technical difficulties had arisen during the development of the aircraft.

Concerned that Fitzgerald might have suffered retaliation for his congressional testimony, the Subcommittee on Economy in Government convened public hearings on Fitzgerald's dismissal.[2] The press reported those hearings prominently, as it had the earlier announcement that his job was being eliminated by the Department of Defense. At a news conference on December 8, 1969, President Richard Nixon was queried about Fitzgerald's impending separation from government service.[3] The President responded by promising to

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[1] See *Economics of Military Procurement: Hearings Before the Subcommittee on Economy in Government of the Joint Economic Comm.*, 90th Cong., 2d Sess., Part I, at 199–201 (1968–1969). It is not disputed that officials in the Department of Defense were both embarrassed and angered by Fitzgerald's testimony. Within less than two months of respondent's congressional appearance, staff had prepared a memorandum for the outgoing Secretary of the Air Force, Harold Brown, listing three ways in which Fitzgerald might be removed from his position. See App. 209–211 (Memorandum of John Lang to Harold Brown, Jan. 6, 1969). Among these was a "reduction in force"—the means by which Fitzgerald ultimately was removed by Brown's successor in office under the new Nixon administration. The reduction in force was announced publicly on November 4, 1969, and Fitzgerald accordingly was separated from the Air Force upon the elimination of his job on January 5, 1970.

[2] See *The Dismissal of A. Ernest Fitzgerald by the Department of Defense: Hearings Before the Subcomm. on Economy in Government of the Joint Economic Comm.*, 91st Cong., 1st Sess. (1969). Some 60 Members of Congress also signed a letter to the President protesting the "firing of this dedicated public servant" as a "punitive action." *Id.*, at 115–116.

[3] A briefing memorandum on the Fitzgerald matter had been prepared by White House staff in anticipation of a possible inquiry at the forthcoming press conference. Authored by aide Patrick Buchanan, it advanced the view that the Air Force was "firing . . . a good public servant." App. 269 (Memorandum of Patrick Buchanan to Richard Nixon, December 5, 1969). The memorandum suggested that the President order Fitzgerald's

look into the matter.[4] Shortly after the news conference the petitioner asked White House Chief of Staff H.R. Haldeman to arrange for Fitzgerald's assignment to another job within the Administration.[5] It also appears that the President suggested to Budget Director Robert Mayo that Fitzgerald might be offered a position in the Bureau of the Budget.[6]

Fitzgerald's proposed reassignment encountered resistance within the Administration.[7] In an internal memorandum of January 20, 1970, White House aide Alexander Butterfield reported to Haldeman that "Fitzgerald is no doubt a top-notch cost expert, but he must be given very low marks in loyalty; and after all, loyalty is the name of the game."[8] Butterfield therefore recommended that "We should let him bleed, for a while at least."[9] There is no evidence of White

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retention by the Defense Department.

[4] App. 228.

[5] See App. 109–112 (Deposition of H.R. Haldeman); App. 137–141 (Deposition of petitioner Richard Nixon). Haldeman's deposed testimony was based on his handwritten notes of December 12, 1969. App. 275.

[6] See App. 126 (Deposition of Robert Mayo); App. 141 (Deposition of Richard Nixon).

[7] Both Mayo and his deputy, James Schlesinger, appear to have resisted at least partly due to a suspicion that Fitzgerald lacked institutional loyalty to Executive policies and that he spoke too freely in communications with friends on Capitol Hill. Both also stated that high level positions were presently unavailable within the Bureau of the Budget. See App. 126 (Deposition of Robert Mayo); App. 146–147 (Deposition of James Schlesinger).

[8] Quoted in *Decision on the Appeal of A. Ernest Fitzgerald* (*CSC Decision*), reprinted in App., at 60, 84 (September 18, 1973). (Page citations to the *CSC Decision* refer to the cited page in the Joint Appendix).

[9] *Id.*, at 85. The memorandum added that "We owe 'first choice on Fitzgerald' to [Senator] Proxmire and others who tried so hard to make him a hero [for exposing the cost overruns]." Suspicion of Fitzgerald's assumed loyalty toward Senator Proxmire was widely shared in the White House and in the Defense Department. According to the *CSC Decision*, *supra*: "While Mr. Fitzgerald has denied that he was 'Senator Proxmire's boy in the Air Force,' and he may honestly believe it, we find this statement difficult to accept. It is evident that the top officials in the Air Force, without

House efforts to reemploy Fitzgerald subsequent to the Butterfield memorandum.

Absent any offer of alternative federal employment, Fitzgerald complained to the Civil Service Commission. In a letter of January 20, 1970, he alleged that his separation represented unlawful retaliation for his truthful testimony before a congressional committee.[10] The Commission convened a closed hearing on Fitzgerald's allegations on May 4, 1971. Fitzgerald, however, preferred to present his grievances in public. After he had brought suit and won an injunction, *Fitzgerald* v. *Hampton*, 467 F. 2d 755 (CADC 1972), public hearings commenced on January 26, 1973. The hearings again generated publicity, much of it devoted to the testimony of Air Force Secretary Robert Seamans. Although he denied that Fitzgerald had lost his position in retaliation for congressional testimony, Seamans testified that he had received "some advice" from the White House before Fitzgerald's job was abolished.[11] But the Secretary declined to be more specific. He responded to several questions by invoking "executive privilege."[12]

At a news conference on January 31, 1973, the President was asked about Mr. Seamans' testimony. Mr. Nixon took the opportunity to assume personal responsibility for Fitzgerald's dismissal:

> "I was totally aware that Mr. Fitzgerald would be fired or discharged or asked to resign. I approved it and Mr. Seamans must have been talking to someone who had discussed the matter with me. No, this was

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specifically saying so, considered him to be just that. . . . We also note that upon leaving the Air Force Mr. Fitzgerald was employed as a consultant by the Proxmire Committee and that Senator Proxmire appeared at the Commission hearing as a character witness for [Fitzgerald]." App. 83.

[10] *Id.*, at 61.

[11] See *id.*, at 83–84.

[12] See *ibid.*

> not a case of some person down the line deciding he should go. It was a decision that was submitted to me. I made it and I stick by it." [13]

A day later, however, the White House press office issued a retraction of the President's statement. According to a press spokesman, the President had confused Fitzgerald with another former executive employee. On behalf of the President, the spokesman asserted that Mr. Nixon had not had "put before him the decision regarding Mr. Fitzgerald." [14]

After hearing over 4,000 pages of testimony, the Chief Examiner for the Civil Service Commission issued his decision in the Fitzgerald case on September 18, 1973. *Decision on the Appeal of A. Ernest Fitzgerald*, as reprinted in App., at 60. The Examiner held that Fitzgerald's dismissal had offended applicable civil service regulations. App. 86–87.[15] The Examiner based this conclusion on a finding that the departmental reorganization in which Fitzgerald lost his job,

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[13] App. 185. A few hours after the press conference, Mr. Nixon repeated privately to Presidential aide Charles Colson that he had ordered Fitzgerald's firing. App. 214–215 (recorded conversation of Jan. 31, 1973).

[14] App. 196 (transcription of statement of White House press secretary Ronald Ziegler, Feb. 1, 1973). In a conversation with aide John Ehrlichman, following his conversation with Charles Colson, see *supra* note 13, the President again had claimed responsibility for Fitzgerald's dismissal. When Ehrlichman corrected him on several details, however, the President concluded that he was "thinkin' of another case." App. 218 (recorded conversation of Jan. 31, 1973). See *id.*, at 220. It was after this conversation that the retraction was ordered.

[15] Fitzgerald's position in the Air Force was in the "excepted service" and therefore not covered by civil service rules and regulations for the competitive service. *Fitzgerald* v. *Hampton*, 467 F. 2d 755, 758 (CADC 1972); see *CSC Decision*, App., at 63–64. In *Hampton*, however, the court held that Fitzgerald's employment nonetheless was under "legislative protection," since he was a "preference eligible" veteran entitled to various statutory protections under the Veterans Preference Act. See 467 F. 2d, at 758–768. Among these were the benefits of the reduction in force procedures established by civil service regulation. See 467 F. 2d, at 758.

though purportedly implemented as an economy measure, was in fact motivated by "reasons purely personal to" respondent. *Id.*, at 86. As this was an impermissible basis for a reduction in force,[16] the Examiner recommended Fitzgerald's reappointment to his old position or to a job of comparable authority.[17] The Examiner, however, explicitly distinguished this narrow conclusion from a suggested finding that Fitzgerald had suffered retaliation for his testimony to Congress. As found by the Commission, "the evidence in the record does not support [Fitzgerald's] allegation that his position was abolished and that he was separated . . . in retaliation for his having revealed the C–5A cost overrun in testimony before the Proxmire Committee on November 13, 1968." *Id.*, at 81.

Following the Commission's decision, Fitzgerald filed a suit for damages in the United States District Court. In it he raised essentially the same claims presented to the Civil Service Commission.[18] As defendants he named eight offi-

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[16] The Examiner found that Fitzgerald in fact was dismissed because of his superiors' dissatisfaction with his job performance. App. 86–87. Their attitude was evidenced by "statements that he was not a 'team player' and 'not on the Air Force team.'" App. 83. Without deciding whether this would have been an adequate basis for an "adverse action" against Fitzgerald as an "inadequate or unsatisfactory employee," *id.*, at 86, the Examiner held that the Commission's adverse action procedures, current version codified at 5 CFR § 752, implicitly forbade the Air Force to employ a "reduction in force" as a means of dismissing respondent for reasons "personal to" him. App. 87.

[17] The Commission also ordered that Fitzgerald should receive back pay. App. 87–88. Despite the Commission's order, respondent avers that he "has still not obtained reinstatement to a position equivalent to his former one," Brief for Respondent, at 11, n. 17, and that he therefore has brought an enforcement action in the District Court.

[18] The complaint alleged a continuing conspiracy to deprive him of his job, to deny him reemployment, and to besmirch his reputation. Fitzgerald alleged that the conspiracy had continued through the Commission hearings and remained in existence at the initiation of the lawsuit. See *Fitzgerald* v. *Seamans*, 384 F. Supp. 688, 690–692 (DC 1974).

cials of the Defense Department, White House aide Alexander Butterfield, and "one or More" unnamed "White House Aides" styled only as "John Does."

The District Court dismissed the action under the District of Columbia's three-year statute of limitations, *Fitzgerald* v. *Seamans*, 384 F. Supp. 688 (D.D.C. 1974), and the Court of Appeals affirmed as to all but one defendant, White House aide Alexander Butterfield, *Fitzgerald* v. *Seamans*, 553 F. 2d 220 (CADC 1977). The Court of Appeals reasoned that Fitzgerald had no reason to suspect White House involvement in his dimissal at least until 1973. In that year, reasonable grounds for suspicion had arisen, most notably through publication of the internal White House memorandum in which Butterfield had recommended that Fitzgerald at least should be made to "bleed for a while" before being offered another job in the Administration. *Id.*, at 225, 229. Holding that concealment of illegal activity would toll the statute of limitations, the Court of Appeals remanded the action against Butterfield for further proceedings in the District Court.

Following the remand and extensive discovery thereafter, Fitzgerald filed a Second Amended Complaint in the District Court on July 5, 1978. It was in this amended complaint—more than eight years after he had complained of his discharge to the Civil Service Commission—that Fitzgerald first named the petitioner Nixon as a party defendant.[13] Also included as defendants were White House aide Bryce Harlow and other officials of the Nixon administration. Additional discovery ensued. By March 1980, only three defendants remained: the petitioner Richard Nixon and White House aides

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[13]The general allegations of the complaint remained essentially unchanged. In averring Nixon's participation in the alleged conspiracy against him, the complaint quoted petitioner's press conference statement that he was "totally aware" of and in fact "approved" Fitzgerald's dismissal. Second Amended Complaint 6.

Harlow and Butterfield. Denying a motion for summary judgment, the District Court ruled that the action must proceed to trial. Its order of March 26 held that Fitzgerald had stated triable causes of action under two federal statutes and the First Amendment to the Constitution.[9] The Court also ruled that petitioner was not entitled to claim absolute presidential immunity.

Petitioner took a collateral appeal of the immunity decision to the Court of Appeals for the District of Columbia Circuit. The Court of Appeals dismissed summarily. It apparently did so on the ground that its recent decision in *Halperin* v. *Kissinger*, 606 F. 2d 1192 (CADC 1979), aff'd by an equally divided vote, 452 U. S. 713 (1981), had rejected this claimed immunity defense.

As this Court has not ruled on the scope of immunity available to a President of the United States, we granted certiorari to decide this important issue. 452 U. S. 957 (1981).

II

Before addressing the merits of this case, we must consider two challenges to our jurisdiction. In his opposition to

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[9] See Cert. App. 1–2. The District Court held that respondent was entitled to "infer" a cause of action under 5 U. S. C. § 7211 and 18 U. S. C. § 1505. Neither expressly confers a private right to sue for relief in damages. The first, 5 U. S. C. § 7211 (Supp. III 1979), provides generally that "The right of employees . . . to . . . furnish information to either House of Congress, or to a committee or a Member thereof, may not be interfered with or denied." The second, 18 U. S. C. § 1505, is a criminal statute making it a crime to obstruct congressional testimony. The correctness of the decision that a cause of action could be "implied" under these statutes is not currently before us. As explained *infra*, this case is here under the "collateral order" doctrine, for review of the District Court's denial of petitioner's motion to dismiss on the ground that he enjoyed absolute immunity from civil suit. The District Court also held that respondent had stated a claim under the common law of the District of Columbia, but respondent subsequently abandoned his common law cause of action. See Supplemental Brief for Respondent 2 (May 14, 1980).

the petition for certiorari, respondent argued that this Court is without jurisdiction to review the non-final order in which the District Court rejected petitioner's claim to absolute immunity.[21] We also must consider an argument that an agreement between the parties has mooted the controversy.

A

Petitioner invokes the jurisdiction of this Court under 28 U. S. C. § 1254, a statute that invests us with authority to review "[c]ases in" the courts of appeals.[22] When the petitioner in this case sought review of an interlocutory order denying his claim to absolute immunity, the Court of Appeals dismissed the appeal for lack of jurisdiction. Emphasizing the "jurisdictional" basis for the Court of Appeals' decision, respondent argued that the District Court's order was not an appealable "case" properly "in" the Court of Appeals within the meaning of § 1254. We do not agree.

Under the "collateral order" doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949), a small class of interlocutory orders are immediately appealable to the courts of appeals. As defined by *Cohen*, this class embraces orders that "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and [are] effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 468 (1978); see *Cohen*, *supra*, 337 U. S., at 546–547. As an additional requirement,

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[21] See Brief for Respondent in Opposition 2. Although Fitzgerald has not continued to urge this argument, the challenge was jurisdictional, and we therefore address it.

[22] The statute provides in pertinent part:

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. . . .

28 U. S. C. § 1254.

Cohen established that a collateral appeal of an interlocutory order must "present[] a serious and unsettled question." 337 U. S., at 547. At least twice before this Court has held that orders denying claims of absolute immunity are appealable under the *Cohen* criteria. See *Helstoski* v. *Meanor*, 442 U. S. 500 (1979) (claim of immunity under the Speech and Debate Clause); *Abney* v. *United States*, 431 U. S. 651 (1977) (claim of immunity under Double Jeopardy Clause). In previous cases the Court of Appeals for the District of Columbia Circuit also has treated orders denying absolute immunity as appealable under *Cohen*. See *Briggs* v. *Goodwin*, 569 F. 2d 10, 58–60 (CADC 1977) (Wilkey, J., writing separately for the Court on the appealability issue); *McSurely* v. *McClellan*, 521 F. 2d 1024, 1032 (1975), aff'd in pertinent part en banc, 553 F. 2d 1277, 1283–1284 n. 18 (1976), cert dismissed *sub nom. McAdams* v. *McSurely*, 438 U. S. 189 (1978).

In "dismissing" the appeal in this case, the Court of Appeals appears to have reasoned that petitioner's appeal lay outside the *Cohen* doctrine because it raised no "serious and unsettled question" of law. This argument was pressed by the respondent, who asked the Court of Appeals to dismiss on the basis of that court's "controlling" decision in *Halperin* v. *Kissinger*, *supra*.

Under the circumstances of this case, we cannot agree that petitioner's interlocutory appeal failed to raise a "serious and unsettled" question. Although the Court of Appeals had ruled in *Halperin* v. *Kissinger* that the President was not entitled to absolute immunity, this Court never had so held. And a petition for certiorari in *Halperin* was pending in this Court at the time petitioner's appeal was dismissed. In light of the special solicitude due to claims alleging a threatened breach of essential Presidential prerogatives under the separation of powers, see *United States* v. *Nixon*, 418 U. S. 683, 691–692 (1974), we conclude that petitioner did present a "serious and unsettled" and therefore appealable question to the Court of Appeals. It follows that the case was "in" the

Court of Appeals under § 1254 and properly within our certiorari jurisdiction.[23]

B

Shortly after petitioner had filed his petition for ceriorari in this Court and respondent had entered his opposition, the parties reached an agreement to liquidate damages.[24] Under its terms the petitioner Nixon paid the respondent Fitzgerald a sum of $142,000. In consideration Fitzgerald agreed to accept liquidated damages of $28,000 in the event of a ruling by this Court that petitioner was not entitled to absolute immunity. In case of a decision upholding petitioner's immunity claim, no further payments would be made.

The limited agreement between the parties left both petitioner and respondent with a considerable financial stake in the resolution of the question presented in this Court. As we recently concluded in a case involving a similar contract, "Given respondents' continued active pursuit of monetary re-

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[23] There can be no serious doubt concerning our power to review a court of appeals' decision to dismiss for lack of jurisdiction—a power we have exercised routinely. See, *e. g.*, *Gardner* v. *Westinghouse Broadcasting Co.*, 437 U. S. 478 (1978). If we lacked authority to do so, decisions to dismiss for want of jurisdiction would be insulated entirely from review by this Court.

Nor, now that we have taken jurisdiction of the case, need we remand to the Court of Appeals for a decision on the merits. The immunity question is a pure issue of law, appropriate for our immediate resolution. Especially in light of the Court of Appeals' now-binding decision of the issue presented, concerns of judicial economy fully warrant our decision of the important question presented.

[24] Respondent filed a copy of this agreement with the Clerk of this Court on August 24, 1981, as an appendix to his Brief in Opposition to a Motion of Morton, Ina, David, Mark and Gary Halperin to Intervene and for Other Relief. On June 10, 1980, prior to the Court's action on the petition for certiorari, counsel to the parties had advised the Court that their clients had reached an agreement to liquidate damages, but that there remained a live controversy. Counsel did not include a copy of the agreement in their initial submission.

lief, this case remains 'definite and concrete, touching the legal relations of parties having adverse legal interests.'" *Havens Realty Co.* v. *Coleman*, —— U. S. ——, —— (1982), quoting *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240–241 (1937).

III

A

This Court consistently has recognized that government officials are entitled to some form of immunity from suits for civil damages. In *Spalding* v. *Vilas*, 161 U. S. 483 (1896), the Court considered the immunity available to the Postmaster General in a suit for damages based upon his official acts. Drawing upon principles of immunity developed in English cases at common law, the Court concluded that "[t]he interests of the people" required a grant of absolute immunity to public officers. *Id.*, at 498. In the absence of immunity, the Court reasoned, executive officials would hesitate to exercise their discretion in a way "injuriously affect[ing] the claims of particular individuals," *id.*, at 499, even when the public interest required bold and unhesitating action. Considerations of "public policy and convenience" therefore compelled a judicial recognition of immunity from suits arising from official acts.

> "In exercising the functions of his office, the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government, if he were subjected to any such restraint." *Id.*, at 498.

Decisions subsequent to *Spalding* have extended the de-

fense of immunity to actions besides those at common law. In *Tenney* v. *Brandhove*, 341 U. S. 367 (1951), the Court considered whether the passage of 42 U. S. C. § 1983, which made no express provision for immunity for any official, had abrogated the privilege accorded to state legislators at common law. *Tenney* held that it had not. Examining § 1983 in light of the "presuppositions of our political history" and our heritage of legislative freedom, the Court found it incredible "that Congress . . . would impinge on a tradition so well grounded in history and reason" without some indication of intent more explicit than the general language of the statute. *Id.*, at 376. Similarly, the decision in *Pierson* v. *Ray*, 386 U. S. 547 (1967), involving a § 1983 suit against a state judge, recognized the continued validity of the absolute immunity of judges for acts within the judicial role. This was a doctrine "'not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.'" *Id.*, at 554, quoting, *Scott* v. *Stansfield*, L.R. 3 Ex. 220, 223 (1868). See *Bradley* v. *Fisher*, 13 Wall. 335 (1872). The Court in *Pierson* also held that police officers are entitled to a qualified immunity protecting them from suit when their official acts are performed in "good faith." *Id.*, at 557.

In *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974), the Court considered the immunity available to state executive officials in a § 1983 suit alleging the violation of constitutional rights. In that case we rejected the officials' claim to absolute immunity under the doctrine of *Spalding* v. *Vilas*, finding instead that state executive officials possessed a "good faith" immunity from § 1983 suits alleging constitutional violations. Balancing the purposes of § 1983 against the imperatives of public policy, the Court held that "in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of

discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based." 416 U. S., at 247.

As construed by subsequent cases, *Scheuer* established a two-tiered division of immunity defenses in § 1983 suits. To most executive officers *Scheuer* accorded qualified immunity. For them the scope of the defense varied in proportion to the nature of their official functions and the range of decisions that conceivably might be taken in "good faith". This "functional" approach also defined a second tier, however, at which the especially sensitive duties of certain officials—notably judges and prosecutors—required the continued recognition of absolute immunity. See, *e. g.*, *Imbler* v. *Pachtman*, 424 U. S. 409 (1976) (state prosecutors possess absolute immunity with respect to the initiation and pursuit of prosecutions); *Stump* v. *Sparkman*, 435 U. S. 349 (1978) (state judge possesses absolute immunity for all judicial acts).

This approach was reviewed in detail in *Butz* v. *Economou*, 438 U. S. 478 (1978), when we considered for the first time the kind of immunity possessed by *federal* executive officials who are sued for constitutional violations.[25] In *Butz* the Court rejected an argument, based on decisions involving federal officials charged with common law torts, that all high federal officials have a right to absolute immunity from constitutional damage actions. Concluding that a blanket recognition of absolute immunity would be anomalous in light of the qualified immunity standard applied to state executive officials, 438 U. S., at 504, we held that federal officials generally have the same qualified immunity possessed by state officials in cases under § 1983. In so doing we reaffirmed our holdings that some officials, notably judges and prosecutors,

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[25] *Spalding* v. *Vilas*, 161 U. S. 483 (1896), was distinguished on the ground that the suit against the Postmaster General had asserted a common law—and not a constitutional—cause of action. See *Butz*, v. *Economou*, 438 U. S. 478, 493–495 (1978).

"because of the special nature of their responsibilities," *id.*, at 511, "require a full exemption from liability." *Id.*, at 508. In *Butz* itself we upheld a claim of absolute immunity for administrative officials engaged in functions analogous to those of judges and prosecutors. *Ibid.* We also left open the question whether other federal officials could show that "public policy requires an exemption of that scope." *Id.*, at 506.

B

Our decisions concerning the immunity of government officials from civil damages liability have been guided by the Constitution, federal statutes, and history. Additionally, at least in the absence of explicit constitutional or congressional guidance, our immunity decisions have been informed by the common law. See *Butz* v. *Economou*, *supra*, at 508; *Imbler* v. *Pachtman*, 424 U. S. 409, 421 (1976). This Court necessarily also has weighed concerns of public policy, especially as illuminated by our history and the structure of our government. See, *e. g.*, *Butz* v. *Economou*, *supra*, at 508; *Imbler* v. *Pachtman*, *supra*, at 421; *Spalding* v. *Vilas*, *supra*, at 498.[25]

This case now presents the claim that the President of the United States is shielded by absolute immunity from civil damages liability. In the case of the President the inquiries into history and policy, though mandated independently by our cases, tend to converge. Because the Presidency did not exist through most of the development of common law, any historical analysis must draw its evidence primarily from our constitutional heritage and structure. Historical inquiry thus merges almost at its inception with the kind of "public policy" analysis appropriately undertaken by a federal court.

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[25] Although the Court in *Butz* v. *Economou*, *supra*, at 508, described the requisite inquiry as one of "public policy," the focus of inquiry more accurately may be viewed in terms of the "inherent" or "structural" assumptions of our scheme of government.

This inquiry involves policies and principles that may be considered implicit in the nature of the President's office in a system structured to achieve effective government under a constitutionally mandated separation of powers.

IV

Here a former President asserts his immunity from civil damages claims of two kinds. He stands named as a defendant in a direct action under the Constitution and in two statutory actions under federal laws of general applicability. In neither case has Congress taken express legislative action to subject the President to civil liability for his official acts.[27]

Applying the principles of our cases to claims of this kind, we hold that petitioner, as a former President of the United States, is entitled to absolute immunity from damages liability predicated on his official acts. We consider this immu-

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[27] In the present case we therefore are presented only with "implied" causes of action, and we need not address directly the immunity question as it would arise if Congress expressly had created a damages action against the President of the United States. This approach accords with this Court's settled policy of avoiding unnecessary decision of constitutional issues. Reviewing this case under the "collateral order" doctrine, see *supra*, we assume for purposes of this opinion that private causes of action may be inferred both under the First Amendment and the two statutes on which respondent relies. But it does not follow that we must—in considering a *Bivens* remedy or interpreting a statute *in light of the immunity doctrine*—assume that the cause of action runs against the President of the United States. Cf. *Tenney* v. *Brandhove*, 341 U. S. 367, 376 (1951) (construing § 1983 in light of the immunity doctrine, the Court could not accept "that Congress . . . would impinge on a tradition [of legislative immunity] so well grounded in history and reason by convert inclusion in the general language before us," and therefore would not address issues that would arise if Congress had undertaken to deprive state legislators of absolute immunity). Consequently, our holding today need only be that the President is absolutely immune from civil damages liability for his official acts in the absence of explicit affirmative action by Congress. We decide only this constitutional issue, which is necessary to disposition of the case before us.

nity a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history. Justice Story's analysis remains persuasive:

> "There are . . . incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions, which are confided to it. Among these, must necessarily be included the power to perform them. . . . The president cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability." J. Story, Commentaries on the Constitution of the United States, § 1563, at 418–419 (1833 ed.).

A

The President occupies a unique position in the constitutional scheme. Article II of the Constitution provides that "[t]he executive Power shall be vested in a President of the United States. . . ." This grant of authority establishes the President as the chief constitutional officer of the Executive Branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity. These include the enforcement of federal law—it is the President who is charged constitutionally to "take care that the laws be faithfully executed";[28] the conduct of foreign affairs—a realm in which the Court has recognized that "[i]t would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret";[29] and management of the Executive Branch—a task for which "imperative reasons re-

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[28] U. S. Const., Art II, § 3.

[29] *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U. S. 103, 111 (1948).

quir[e] an unrestricted power [in the President] to remove the most important of his subordinates in their most important duties."[30]

In arguing that the President is entitled only to qualified immunity, the respondent relies on cases in which we have recognized immunity of this scope for governors and cabinet officers. *E. g.*, *Butz* v. *Economou*, 438 U. S. 478; *Scheuer* v. *Rhodes*, 416 U. S. 232. We find these cases to be inapposite. The President's unique status under the Constitution distinguishes him from other executive officials.[31]

Because of the singular importance of the President's du-

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[30] *Myers* v. *United States*, 272 U. S. 52, 134–135 (1926).

[31] Noting that the "Speech and Debate Clause" provides a textual basis for congressional immunity, respondent argues that the Framers must be assumed to have rejected any similar grant of Executive immunity. This argument is unpersuasive. First, a specific textual basis has not been considered a prerequisite to the recognition of immunity. No provision expressly confers judicial immunity. Yet the immunity of judges is well settled. See, *e. g.*, *Bradley* v. *Fisher*, 13 Wall 335 (1872); *Stump* v. *Sparkman*, *supra*. Second, this Court already has established that absolute immunity may be extended to certain officials of the Executive Branch. *Butz* v. *Economou*, *supra*, 438 U. S., at 511–512; see *Imbler* v. *Pachtman*, *supra* (extending immunity to prosecutorial officials within the Executive Branch). Third, there is historical evidence from which it may be inferred that the Framers assumed the President's immunity from damages liability. At the Constitutional Convention several delegates expressed concern that subjecting the President even to impeachment would impair his capacity to perform his duties of office. See 2 M. Farrand, Records of the Constitutional Convention of 1787 (1934), at 64 (remarks of Gouvernor Morris); *id.*, at 66 (remarks of Charles Pinckney). The delegates of course did agree to an Impeachment Clause. But nothing in their debates suggests an expectation that the President would be subjected to the distraction of suits by disappointed private citizens. And Senator Maclay has recorded the views of Senator Ellsworth and Vice-President John Adams—both delegates to the Convention—that "the President, personally, was not subject to any process whatever. . . . For [that] would put it in the power of a common justice to exercise any authority over him, and stop the whole machine of government." W. Maclay, Journal of W. Maclay 167 (E. Maclay ed. 1890). Justice Story, writing in 1833, held it implicit in the separation of powers that the President must be permitted to discharge his

ties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government. As is the case with prosecutors and judges—for whom absolute immunity now is established—a President

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duties undistracted by private lawsuits. J. Story, Commentaries on the Constitution of the United States, § 1563, at 418–419 (1833 ed.) (quoted *supra*). Thomas Jefferson also argued that the President was not intended to be subject to judicial process. When Chief Justice Marshall held in *United States* v. *Burr*, 25 Fed. Cas. 30 (1807), that a subpoena duces tecum can be issued to a President, Jefferson protested strongly, and stated his broader view of the proper relationship between the Judiciary and the President:

"The leading principle of our Constitution is the independence of the Legislature, executive and judiciary of each other, and none are more jealous of this than the judiciary. But would the executive be independent of the judiciary, if he were subject to the *commands* of the latter, & to imprisonment for disobedience; if the several courts could bandy him from pillar to post, keep him constantly trudging from north to south & east to west, and withdraw him entirely from his constitutional duties? The intention of the Constitution, that each branch should be independent of the others, is further manifested by the means it has furnished to each, to protect itself from enterprises of force attempted on them by the others, and to none has it given more effectual or diversified means than to the executive." 10 The Works of Thomas Jefferson 404. (P. Ford ed. 1905) (quoting a letter from President Jefferson to a prosecutor at the Burr trial) (emphasis in the original). See also 5 D. Malone, Jefferson and His Time: Jefferson the President 320–325 (1974).

In light of the fragmentary character of the most important materials reflecting the Framers' intent, we do think that the most compelling arguments arise from the Constitution's separation of powers and the judiciary's historic understanding of that doctrine. See text *supra*. But our primary reliance on constitutional structure and judicial precedent should not be misunderstood. The best historical evidence clearly supports the Presidential immunity we have upheld. Justice White's dissent cites some other materials, including ambiguous comments made at state ratifying conventions and the remarks of a single publicist. But historical evidence must be weighed as well as cited. When the weight of evidence is considered, we think we must place our reliance on the contemporary understanding of John Adams, Thomas Jefferson, and Oliver Ellsworth. Other powerful support derives from the actual history of private lawsuits against the President. Prior to the litigation explosion commencing with

omission

must concern himself with matters likely to "arouse the most intense feelings." *Pierson* v. *Ray*, *supra*, 386 U. S., at 554. Yet, as our decisions have recognized, it is in precisely such cases that there exists the greatest public interest in providing an official "the maximum ability to deal fearlessly and impartially with" the duties of his office. *Ferri* v. *Ackerman*, 444 U. S. 193, 203 (1979) (footnote omitted). This concern is compelling where the officeholder must make the most sensitive and far-reaching decisions entrusted to any official under our constitutional system.[32] Nor can the sheer prominence of the President's office be ignored. In view of the visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for suits for civil damages.[33] Cognizance of this personal vulnerability frequently could distract a President from his public duties, to the detriment not only of the President and his office but also the Nation that the Presidency was designed to serve.[34]

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this Court's 1971 *Bivens* decision, fewer than a handful of damages action ever were filed against the President. None appears to have proceeded to judgment on the merits.

[32] Among the most persuasive reasons supporting official immunity is the prospect that damages liability may render an official unduly cautious in the discharge of his official duties. As Judge Learned Hand wrote in *Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (CA2 1949), cert denied, 339 U. S. 949 (1950), "[t]he justification for . . . [denying recovery] is that it is impossible to know whether the claim is well founded until the case has been tried, and to submit all officials, the innocent as well as the guilty, to the burden of trial and the danger of its outcome would dampen the ardor of all but the most resolute. . . ."

[33] These dangers are significant even though there is no historical record of numerous suits against the President, since a right to sue federal officials for damages for constitutional violations was not even recognized until *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971).

[34] In defining the scope of an official's absolute privilege, this Court has recognized that the sphere of protected action must be related closely to the immunity's justifying purposes. Frequently our decisions have held that an official's absolute immunity should extend only to acts in performance of particular functions. See *Butz* v. *Economou*, 438 U. S., at

B

Courts traditionally have recognized the President's constitutional responsibilities and status as factors counselling judicial deference and restraint.[35] For example, while courts

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508–517; cf. *Imbler* v. *Pachtman*, 424 U. S., at 430–431. But the Court also has refused to draw lines finer than history and reason would support. See, *e. g.*, *Spalding* v. *Vilas*, 161 U. S., at 498 (privilege extends to all matters "committed by law to [an official's] control or supervision"); *Barr* v. *Matteo*, 360 U. S., at 575 (fact "that the action here taken was within the outer perimeter of petitioner's line of duty is enough to render the privilege applicable. . . ."); *Stump* v. *Sparkman*, 435 U. S., at 363 and n. 12 (judicial privilege applies even to acts occurring outside "the normal attributes of a judicial proceeding"). In view of the special nature of the President's constitutional office, we think it appropriate to extend to him absolute immunity from damages actions based on acts within the "outer perimeter" of the area of his official responsibility.

Under the Constitution and laws of the United States the President has discretionary responsibilities in a broad variety of areas, many of which are highly sensitive. In many cases it would be difficult to determine which Presidential "function" encompassed a particular action. In this case, for example, respondent argues that he was dismissed in retaliation for his testimony to Congress—a violation of 5 U. S. C. § 7211 and 18 U. S. C. § 1505. The Air Force, however, has claimed that the underlying reorganization was undertaken to promote efficiency. Assuming that the petitioner Nixon ordered the reorganization in which respondent lost his job, an inquiry into the President's motives could not be avoided under the "functional" theory asserted both by respondent and the dissent. Thus, in order to administer functional distinctions among Presidential actions, judges frequently would need to inquire into the purpose for which acts were taken. Inquiries of this kind could be highly intrusive.

Here respondent argues that petitioner Nixon would have acted outside the perimeter of his duties by ordering the discharge of respondent Fitzgerald, who was lawfully entitled to retain his job in the absence of "such cause as will promote the efficiency of the service." Brief for Respondent 39, citing 5 U. S. C. § 7512(a). Because Congress has granted this legislative protection, respondent argues, no federal official could, within his authority, cause Fitzgerald to be dismissed without satisfying this standard of proof in prescribed statutory proceedings.

This construction of the President's authority would subject him to trial

generally have looked to the common law to determine the scope of an official's evidentiary privilege,[46] we have recognized that the Presidential privilege is "rooted in the separation of powers under the Constitution." *United States* v. *Nixon*, 418 U. S. 683, 708 (1974). It is settled law that the separation of powers doctrine does not bar every exercise of jurisdiction over the President of the United States. See, *e. g.*, *United States* v. *Nixon*, *supra*; *United States* v. *Burr*, 25 Fed. Cases 191, 196 (1807); cf. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952).[47] But our cases also have established that a court, before exercising jurisdiction, must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch. See *Nixon* v. *General*

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on every allegation that an allegedly tortious action was taken for a forbidden purpose. Adoption of this construction thus would deprive absolute immunity of its intended effect.

It clearly is within the President's authority to "prescribe" the manner in which the Secretary will "conduct the business" of the Air Force. 10 U. S. C. §8012(b). Because this mandate includes the authority to prescribe reorganizations and reductions in force, petitioner's alleged wrongful acts lay well within the outer perimeter of his authority.

[46] This tradition can be traced far back into our constitutional history. See, *e. g.*, *Mississippi* v. *Johnson*, 71 U. S. 475, 501 (1866), ("[W]e are fully satisfied that this court has no jurisidiction of a bill to enjoin the President in the performance of his official duties; and that no such bill ought to be received by us."); *Kendall* v. *United States*, 12 Pet. 524, 610 (1838) ("The executive power is vested in a President; and as far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeaching power.").

[47] See *United States* v. *Reynolds*, 345 U. S. 1, 6–7 (1953) (Secretary of the Air Force); *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 323–324 (DDC 1966), aff'd, 384 F. 2d 979 (CADC), cert denied, 389 U. S. 952 (1967) (Department of Justice officials).

[47] Although the President was not a party, the Court enjoined the Secretary of Commerce from executing a direct Presidential order. See 343 U. S., at 583.

Services Administration, 433 U. S. 425, 443 (1977); *United States* v. *Nixon*, 418 U. S. 683, 703–713 (1974). When judicial action is needed to serve broad public interests—as when the Court acts, not in derogation of the separation of powers, but to maintain their proper balance, cf. *Youngstown Sheet & Tube Co.* v. *Sawyer*, *supra*, or to vindicate the public interest in an ongoing criminal prosecution, see *United States* v. *Nixon*, *supra*—the exercise of jurisdiction has been held warranted. In the case of this merely private suit for damages based on a President's official acts, we hold it is not.[32]

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[32] The Court has recognized before that there is a lesser public interest in actions for civil damages than, for example, in criminal prosecutions. See *United States* v. *Gillock*, 445 U. S. 360, 371–373 (1980); cf. *United States* v. *Nixon*, 418 U. S., at 711–712 and n. 19 (basing holding on special importance of evidence in a criminal trial and distinguishing civil actions as raising different questions not presented for decision). It never has been denied that absolute immunity may impose a regrettable cost on individuals whose rights have been violated. But, contrary to the suggestion of JUSTICE WHITE's dissent, it is not true that our jurisprudence ordinarily supplies a remedy in civil damages for every legal wrong. The dissent's objections on this ground would weigh equally against absolute immunity for any official. Yet the dissent makes no attack on the absolute immunity recognized for judges and prosecutors.

Our implied-rights-of-action cases identify another area of the law in which there is not a damages remedy for every legal wrong. These cases establish that victims of statutory crimes ordinarily may not sue in federal court in the absence of expressed congressional intent to provide a damages remedy. See, *e. g.*, *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, —— U. S. —— (1982); *Middlesex County Sewerage Auth.* v. *National Sea Clammers Assn.*, 453 U. S. 1 (1981); *California* v. *Sierra Club*, 451 U. S. 287 (1981). JUSTICE WHITE does not refer to the jurisprudence of implied rights of action. Finally, the dissent undertakes no discussion of cases in the *Bivens* line in which this Court has suggested that that there would be no damages relief in circumstances "counselling hesitation" by the judiciary. See *Bivens* v. *Six Unknown Federal Agents*, 403 U. S., at 396; *Carlson* v. *Green*, 446 U. S., at 19 (in direct constitutional actions against officials with "independent status in our constitutional scheme . . . judicially created remedies . . . might be inappropriate").

Even the case on which JUSTICE WHITE places principal reliance,

V

A rule of absolute immunity for the President will not leave the Nation without sufficient protection against misconduct on the part of the chief executive.[39] There remains the constitutional remedy of impeachment.[40] In addition, there are formal and informal checks on Presidential action that do not apply with equal force to other executive officials. The President is subjected to constant scrutiny by the press. Vigilant oversight by Congress also may serve to deter Presidential abuses of office, as well as to make credible the threat of impeachment.[41] Other incentives to avoid misconduct may include a desire to earn re-election, the need to

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Marbury v. *Madison*, 1 Cranch 137 (1803), provides dubious support at best. The dissent cites *Marbury* for the proposition that "The very essence of civil liberty consists in the right of the individual to claim the protection of the laws, whenever he receives an injury." *Id.*, at 163. Yet *Marbury* does not establish that the individual's protection must come in the form of a particular remedy. Marbury, it should be remembered, *lost* his case in the Supreme Court. The Court turned him away with the suggestion that he should have gone elsewhere with his claim. In this case it was clear at least that Fitzgerald was entitled to seek lost wages before the Civil Service Commission—a remedy of which he availed himself. See *supra*, at 4–6 and n. 17.

[39] The presence of alternative remedies has played an important role in our previous decisions in the area of official immunity. *E. g.*, *Imbler* v. *Pachtman*, 424 U. S., at 428–429 ("We emphasize that the immunity of prosecutors from liability in suits under § 1983 does not leave the public powerless to deter misconduct or to punish that which occurs.").

[40] The same remedy plays a central role with respect to the misconduct of federal judges, who also possess absolute immunity. See Kaufman, Chilling Judicial Independence, 88 Yale L.J. 681, 690–706 (1979). Congressmen may be removed from office by a vote of their colleagues. U. S. Const., Art. I, § 5, cl. 2.

[41] Prior to petitioner Nixon's resignation from office, the House Judiciary Committee had convened impeachment hearings. See generally Report of the Committee on the Judiciary of the House of Representatives: Impeachment of Richard M. Nixon President of the United States, H.R. Rep. No. 93–1305 (1974).

maintain prestige as an element of Presidential influence, and a President's traditional concern for his historical stature.

The existence of alternative remedies and deterrents establishes that absolute immunity will not place the President "above the law."[42] For the President, as for judges and prosecutors, absolute immunity merely precludes a particular private remedy for alleged misconduct in order to advance compelling public ends.

VI

For the reasons stated in this opinion, the decision of the Court of Appeals is reversed and the case remanded for action consistent with this opinion.

So ordered.

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[42] The argument of the dissenting opinions, that our decision places the President "above the law," is rhetorically chilling but wholly unjustified. The remedy of impeachment demonstrates that the President remains accountable under law for his misdeeds in office. This case involves only a damages remedy. Although the President is not liable in civil damages for official misbehavior, that does not lift him "above" the law. The dissent does not suggest that a judge is "above" the law when he enters a judgment for which he cannot be held answerable in civil damages; or a prosecutor is above the law when he files an indictment; or a Congressman is above the law when he engages in legislative speech or debate. It is simple error to characterize an official as "above the law" because a particular remedy is not available against him.

6, 23-24, and stylistic
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To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: ADDED AS MADE

6th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1738

RICHARD NIXON, PETITIONER *v.*
A. ERNEST FITZGERALD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June —, 1982]

JUSTICE POWELL delivered the opinion of the Court.

The plaintiff in this lawsuit seeks relief in civil damages from a former President of the United States. The claim rests on actions allegedly taken in the former President's official capacity during his tenure in office. The issue before us is the scope of the immunity possessed by the President of the United States.

I

In January 1970 the respondent A. Ernest Fitzgerald lost his job as a management analyst with the Department of the Air Force. Fitzgerald's dismissal occurred in the context of a departmental reorganization and reduction in force, in which his job was eliminated. In announcing the reorganization, the Air Force characterized the action as taken to promote economy and efficiency in the armed forces.

Respondent's discharge attracted unusual attention in Congress and in the press. Fitzgerald had attained national prominence approximately one year earlier, during the waning months of the presidency of Lyndon B. Johnson. On November 13, 1968, Fitzgerald appeared before the Subcommittee on Economy in Government of the Joint Economic Committee of the United States Congress. To the evident embarrassment of his superiors in the Department of De-

fense, Fitzgerald testified that cost-overruns on the C–5A transport plane could approximate $2 billion.[1] He also revealed that unexpected technical difficulties had arisen during the development of the aircraft.

Concerned that Fitzgerald might have suffered retaliation for his congressional testimony, the Subcommittee on Economy in Government convened public hearings on Fitzgerald's dismissal.[2] The press reported those hearings prominently, as it had the earlier announcement that his job was being eliminated by the Department of Defense. At a news conference on December 8, 1969, President Richard Nixon was queried about Fitzgerald's impending separation from government service.[3] The President responded by promising to

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[1] See *Economics of Military Procurement: Hearings Before the Subcommittee on Economy in Government of the Joint Economic Comm.*, 90th Cong., 2d Sess., Part I, at 199–201 (1968–1969). It is not disputed that officials in the Department of Defense were both embarrassed and angered by Fitzgerald's testimony. Within less than two months of respondent's congressional appearance, staff had prepared a memorandum for the outgoing Secretary of the Air Force, Harold Brown, listing three ways in which Fitzgerald might be removed from his position. See App. 209–211 (Memorandum of John Lang to Harold Brown, Jan. 6, 1969). Among these was a "reduction in force"—the means by which Fitzgerald ultimately was removed by Brown's successor in office under the new Nixon administration. The reduction in force was announced publicly on November 4, 1969, and Fitzgerald accordingly was separated from the Air Force upon the elimination of his job on January 5, 1970.

[2] See *The Dismissal of A. Ernest Fitzgerald by the Department of Defense: Hearings Before the Subcomm. on Economy in Government of the Joint Economic Comm.*, 91st Cong., 1st Sess. (1969). Some 60 Members of Congress also signed a letter to the President protesting the "firing of this dedicated public servant" as a "punitive action." *Id.*, at 115–116.

[3] A briefing memorandum on the Fitzgerald matter had been prepared by White House staff in anticipation of a possible inquiry at the forthcoming press conference. Authored by aide Patrick Buchanan, it advanced the view that the Air Force was "firing . . . a good public servant." App. 269 (Memorandum of Patrick Buchanan to Richard Nixon, December 5, 1969). The memorandum suggested that the President order Fitzgerald's

look into the matter.[4] Shortly after the news conference the petitioner asked White House Chief of Staff H.R. Haldeman to arrange for Fitzgerald's assignment to another job within the Administration.[5] It also appears that the President suggested to Budget Director Robert Mayo that Fitzgerald might be offered a position in the Bureau of the Budget.[6]

Fitzgerald's proposed reassignment encountered resistance within the Administration.[7] In an internal memorandum of January 20, 1970, White House aide Alexander Butterfield reported to Haldeman that "Fitzgerald is no doubt a top-notch cost expert, but he must be given very low marks in loyalty; and after all, loyalty is the name of the game."[8] Butterfield therefore recommended that "We should let him bleed, for a while at least."[9] There is no evidence of White

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retention by the Defense Department.

[4] App. 228.

[5] See App. 109–112 (Deposition of H.R. Haldeman); App. 137–141 (Deposition of petitioner Richard Nixon). Haldeman's deposed testimony was based on his handwritten notes of December 12, 1969. App. 275.

[6] See App. 126 (Deposition of Robert Mayo); App. 141 (Deposition of Richard Nixon).

[7] Both Mayo and his deputy, James Schlesinger, appear to have resisted at least partly due to a suspicion that Fitzgerald lacked institutional loyalty to Executive policies and that he spoke too freely in communications with friends on Capitol Hill. Both also stated that high level positions were presently unavailable within the Bureau of the Budget. See App. 126 (Deposition of Robert Mayo); App. 146–147 (Deposition of James Schlesinger).

[8] Quoted in *Decision on the Appeal of A. Ernest Fitzgerald* (*CSC Decision*), reprinted in App., at 60, 84 (September 18, 1973). (Page citations to the *CSC Decision* refer to the cited page in the Joint Appendix).

[9] *Id.*, at 85. The memorandum added that "We owe 'first choice on Fitzgerald' to [Senator] Proxmire and others who tried so hard to make him a hero [for exposing the cost overruns]." Suspicion of Fitzgerald's assumed loyalty toward Senator Proxmire was widely shared in the White House and in the Defense Department. According to the *CSC Decision*, *supra*: "While Mr. Fitzgerald has denied that he was 'Senator Proxmire's boy in the Air Force,' and he may honestly believe it, we find this statement difficult to accept. It is evident that the top officials in the Air Force, without

House efforts to reemploy Fitzgerald subsequent to the Butterfield memorandum.

Absent any offer of alternative federal employment, Fitzgerald complained to the Civil Service Commission. In a letter of January 20, 1970, he alleged that his separation represented unlawful retaliation for his truthful testimony before a congressional committee.[10] The Commission convened a closed hearing on Fitzgerald's allegations on May 4, 1971. Fitzgerald, however, preferred to present his grievances in public. After he had brought suit and won an injunction, *Fitzgerald* v. *Hampton*, 467 F. 2d 755 (CADC 1972), public hearings commenced on January 26, 1973. The hearings again generated publicity, much of it devoted to the testimony of Air Force Secretary Robert Seamans. Although he denied that Fitzgerald had lost his position in retaliation for congressional testimony, Seamans testified that he had received "some advice" from the White House before Fitzgerald's job was abolished.[11] But the Secretary declined to be more specific. He responded to several questions by invoking "executive privilege."[12]

At a news conference on January 31, 1973, the President was asked about Mr. Seamans' testimony. Mr. Nixon took the opportunity to assume personal responsibility for Fitzgerald's dismissal:

> "I was totally aware that Mr. Fitzgerald would be fired or discharged or asked to resign. I approved it and Mr. Seamans must have been talking to someone who had discussed the matter with me. No, this was

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specifically saying so, considered him to be just that. . . . We also note that upon leaving the Air Force Mr. Fitzgerald was employed as a consultant by the Proxmire Committee and that Senator Proxmire appeared at the Commission hearing as a character witness for [Fitzgerald]." App. 83.

[10] *Id.*, at 61.

[11] See *id.*, at 83–84.

[12] See *ibid.*

> not a case of some person down the line deciding he should go. It was a decision that was submitted to me. I made it and I stick by it."[13]

A day later, however, the White House press office issued a retraction of the President's statement. According to a press spokesman, the President had confused Fitzgerald with another former executive employee. On behalf of the President, the spokesman asserted that Mr. Nixon had not had "put before him the decision regarding Mr. Fitzgerald."[14]

After hearing over 4,000 pages of testimony, the Chief Examiner for the Civil Service Commission issued his decision in the Fitzgerald case on September 18, 1973. *Decision on the Appeal of A. Ernest Fitzgerald*, as reprinted in App., at 60. The Examiner held that Fitzgerald's dismissal had offended applicable civil service regulations. App. 86–87.[15] The Examiner based this conclusion on a finding that the departmental reorganization in which Fitzgerald lost his job,

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[13] App. 185. A few hours after the press conference, Mr. Nixon repeated privately to Presidential aide Charles Colson that he had ordered Fitzgerald's firing. App. 214–215 (recorded conversation of Jan. 31, 1973).

[14] App. 196 (transcription of statement of White House press secretary Ronald Ziegler, Feb. 1, 1973). In a conversation with aide John Ehrlichman, following his conversation with Charles Colson, see *supra* note 13, the President again had claimed responsibility for Fitzgerald's dismissal. When Ehrlichman corrected him on several details, however, the President concluded that he was "thinkin' of another case." App. 218 (recorded conversation of Jan. 31, 1973). See *id.*, at 220. It was after this conversation that the retraction was ordered.

[15] Fitzgerald's position in the Air Force was in the "excepted service" and therefore not covered by civil service rules and regulations for the competitive service. *Fitzgerald* v. *Hampton*, 467 F. 2d 755, 758 (CADC 1972); see *CSC Decision*, App., at 63–64. In *Hampton*, however, the court held that Fitzgerald's employment nonetheless was under "legislative protection," since he was a "preference eligible" veteran entitled to various statutory protections under the Veterans Preference Act. See 467 F. 2d, at 758–768. Among these were the benefits of the reduction in force procedures established by civil service regulation. See 467 F. 2d, at 758.

though purportedly implemented as an economy measure, was in fact motivated by "reasons purely personal to" respondent. *Id.*, at 86. As this was an impermissible basis for a reduction in force,[16] the Examiner recommended Fitzgerald's reappointment to his old position or to a job of comparable authority.[17] The Examiner, however, explicitly distinguished this narrow conclusion from a suggested finding that Fitzgerald had suffered retaliation for his testimony to Congress. As found by the Commission, "the evidence in the record does not support [Fitzgerald's] allegation that his position was abolished and that he was separated . . . in retaliation for his having revealed the C–5A cost overrun in testimony before the Proxmire Committee on November 13, 1968." *Id.*, at 81.

Following the Commission's decision, Fitzgerald filed a suit for damages in the United States District Court. In it he raised essentially the same claims presented to the Civil Service Commission.[18] As defendants he named eight offi-

[16] The Examiner found that Fitzgerald in fact was dismissed because of his superiors' dissatisfaction with his job performance. App. 86–87. Their attitude was evidenced by "statements that he was not a 'team player' and 'not on the Air Force team.'" App. 83. Without deciding whether this would have been an adequate basis for an "adverse action" against Fitzgerald as an "inadequate or unsatisfactory employee," *id.*, at 86, the Examiner held that the Commission's adverse action procedures, current version codified at 5 CFR § 752, implicitly forbade the Air Force to employ a "reduction in force" as a means of dismissing respondent for reasons "personal to" him. App. 87.

[17] The Commission also ordered that Fitzgerald should receive back pay. App. 87–88. Following the Commission's order, respondent was offered a new position with the Defense Department, but not one that he regarded as equivalent to his former employment. Fitzgerald accordingly filed an enforcement action in the District Court. This litigation ultimately culminated in a settlement agreement. Under its terms the United States Air Force agreed to reassign Fitzgerald to his former position as Management Systems Deputy to the Assistant Secretary of the Air Force, effective June 21, 1982. See Settlement Agreement in *Fitzgerald* v. *Hampton, et al.*, Civ. No. 76–1486 (DDC June 15, 1982).

[18] The complaint alleged a continuing conspiracy to deprive him of his

cials of the Defense Department, White House aide Alexander Butterfield, and "one or More" unnamed "White House Aides" styled only as "John Does."

The District Court dismissed the action under the District of Columbia's three-year statute of limitations, *Fitzgerald* v. *Seamans*, 384 F. Supp. 688 (D.D.C. 1974), and the Court of Appeals affirmed as to all but one defendant, White House aide Alexander Butterfield, *Fitzgerald* v. *Seamans*, 553 F. 2d 220 (CADC 1977). The Court of Appeals reasoned that Fitzgerald had no reason to suspect White House involvement in his dimissal at least until 1973. In that year, reasonable grounds for suspicion had arisen, most notably through publication of the internal White House memorandum in which Butterfield had recommended that Fitzgerald at least should be made to "bleed for a while" before being offered another job in the Administration. *Id.*, at 225, 229. Holding that concealment of illegal activity would toll the statute of limitations, the Court of Appeals remanded the action against Butterfield for further proceedings in the District Court.

Following the remand and extensive discovery thereafter, Fitzgerald filed a Second Amended Complaint in the District Court on July 5, 1978. It was in this amended complaint—more than eight years after he had complained of his discharge to the Civil Service Commission—that Fitzgerald first named the petitioner Nixon as a party defendant.[19] Also included as defendants were White House aide Bryce Harlow

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job, to deny him reemployment, and to besmirch his reputation. Fitzgerald alleged that the conspiracy had continued through the Commission hearings and remained in existence at the initiation of the lawsuit. See *Fitzgerald* v. *Seamans*, 384 F. Supp. 688, 690–692 (DC 1974).

[19]The general allegations of the complaint remained essentially unchanged. In averring Nixon's participation in the alleged conspiracy against him, the complaint quoted petitioner's press conference statement that he was "totally aware" of and in fact "approved" Fitzgerald's dismissal. Second Amended Complaint 6.

and other officials of the Nixon administration. Additional discovery ensued. By March 1980, only three defendants remained: the petitioner Richard Nixon and White House aides Harlow and Butterfield. Denying a motion for summary judgment, the District Court ruled that the action must proceed to trial. Its order of March 26 held that Fitzgerald had stated triable causes of action under two federal statutes and the First Amendment to the Constitution.[20] The Court also ruled that petitioner was not entitled to claim absolute presidential immunity.

Petitioner took a collateral appeal of the immunity decision to the Court of Appeals for the District of Columbia Circuit. The Court of Appeals dismissed summarily. It apparently did so on the ground that its recent decision in *Halperin* v. *Kissinger*, 606 F. 2d 1192 (CADC 1979), aff'd by an equally divided vote, 452 U. S. 713 (1981), had rejected this claimed immunity defense.

As this Court has not ruled on the scope of immunity available to a President of the United States, we granted certiorari to decide this important issue. 452 U. S. 957 (1981).

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[20] See Cert. App. 1–2. The District Court held that respondent was entitled to "infer" a cause of action under 5 U. S. C. § 7211 and 18 U. S. C. § 1505. Neither expressly confers a private right to sue for relief in damages. The first, 5 U. S. C. § 7211 (Supp. III 1979), provides generally that "The right of employees . . . to . . . furnish information to either House of Congress, or to a committee or a Member thereof, may not be interfered with or denied." The second, 18 U. S. C. § 1505, is a criminal statute making it a crime to obstruct congressional testimony. The correctness of the decision that a cause of action could be "implied" under these statutes is not currently before us. As explained *infra*, this case is here under the "collateral order" doctrine, for review of the District Court's denial of petitioner's motion to dismiss on the ground that he enjoyed absolute immunity from civil suit. The District Court also held that respondent had stated a claim under the common law of the District of Columbia, but respondent subsequently abandoned his common law cause of action. See Supplemental Brief for Respondent 2 (May 14, 1980).

II

Before addressing the merits of this case, we must consider two challenges to our jurisdiction. In his opposition to the petition for certiorari, respondent argued that this Court is without jurisdiction to review the non-final order in which the District Court rejected petitioner's claim to absolute immunity.[21] We also must consider an argument that an agreement between the parties has mooted the controversy.

A

Petitioner invokes the jurisdiction of this Court under 28 U. S. C. § 1254, a statute that invests us with authority to review "[c]ases in" the courts of appeals.[22] When the petitioner in this case sought review of an interlocutory order denying his claim to absolute immunity, the Court of Appeals dismissed the appeal for lack of jurisdiction. Emphasizing the "jurisdictional" basis for the Court of Appeals' decision, respondent argued that the District Court's order was not an appealable "case" properly "in" the Court of Appeals within the meaning of § 1254. We do not agree.

Under the "collateral order" doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949), a small class of interlocutory orders are immediately appealable to the courts of appeals. As defined by *Cohen*, this class embraces orders that "conclusively determine the disputed question, resolve an important issue completely separate

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[21] See Brief for Respondent in Opposition 2. Although Fitzgerald has not continued to urge this argument, the challenge was jurisdictional, and we therefore address it.

[22] The statute provides in pertinent part:

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. . . .

28 U. S. C. § 1254.

from the merits of the action, and [are] effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 468 (1978); see *Cohen*, *supra*, at 546–547. As an additional requirement, *Cohen* established that a collateral appeal of an interlocutory order must "present[] a serious and unsettled question." 337 U. S., at 547. At least twice before this Court has held that orders denying claims of absolute immunity are appealable under the *Cohen* criteria. See *Helstoski* v. *Meanor*, 442 U. S. 500 (1979) (claim of immunity under the Speech and Debate Clause); *Abney* v. *United States*, 431 U. S. 651 (1977) (claim of immunity under Double Jeopardy Clause). In previous cases the Court of Appeals for the District of Columbia Circuit also has treated orders denying absolute immunity as appealable under *Cohen*. See *Briggs* v. *Goodwin*, 569 F. 2d 10, 58–60 (CADC 1977) (Wilkey, J., writing separately for the Court on the appealability issue); *McSurely* v. *McClellan*, 521 F. 2d 1024, 1032 (1975), aff'd in pertinent part en banc, 553 F. 2d 1277, 1283–1284 n. 18 (1976), cert dismissed *sub nom. McAdams* v. *McSurely*, 438 U. S. 189 (1978).

In "dismissing" the appeal in this case, the Court of Appeals appears to have reasoned that petitioner's appeal lay outside the *Cohen* doctrine because it raised no "serious and unsettled question" of law. This argument was pressed by the respondent, who asked the Court of Appeals to dismiss on the basis of that court's "controlling" decision in *Halperin* v. *Kissinger*, *supra*.

Under the circumstances of this case, we cannot agree that petitioner's interlocutory appeal failed to raise a "serious and unsettled" question. Although the Court of Appeals had ruled in *Halperin* v. *Kissinger* that the President was not entitled to absolute immunity, this Court never had so held. And a petition for certiorari in *Halperin* was pending in this Court at the time petitioner's appeal was dismissed. In light of the special solicitude due to claims alleging a threatened breach of essential Presidential prerogatives under the separation of powers, see *United States* v. *Nixon*, 418 U. S. 683,

691–692 (1974), we conclude that petitioner did present a "serious and unsettled" and therefore appealable question to the Court of Appeals. It follows that the case was "in" the Court of Appeals under § 1254 and properly within our certiorari jurisdiction.[23]

B

Shortly after petitioner had filed his petition for ceriorari in this Court and respondent had entered his opposition, the parties reached an agreement to liquidate damages.[24] Under its terms the petitioner Nixon paid the respondent Fitzgerald a sum of $142,000. In consideration Fitzgerald agreed to accept liquidated damages of $28,000 in the event of a ruling by this Court that petitioner was not entitled to absolute immunity. In case of a decision upholding petitioner's immunity claim, no further payments would be made.

The limited agreement between the parties left both petitioner and respondent with a considerable financial stake in the resolution of the question presented in this Court. As

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[23] There can be no serious doubt concerning our power to review a court of appeals' decision to dismiss for lack of jurisdiction—a power we have exercised routinely. See, *e. g.*, *Gardner* v. *Westinghouse Broadcasting Co.*, 437 U. S. 478 (1978). If we lacked authority to do so, decisions to dismiss for want of jurisdiction would be insulated entirely from review by this Court.

Nor, now that we have taken jurisdiction of the case, need we remand to the Court of Appeals for a decision on the merits. The immunity question is a pure issue of law, appropriate for our immediate resolution. Especially in light of the Court of Appeals' now-binding decision of the issue presented, concerns of judicial economy fully warrant our decision of the important question presented.

[24] Respondent filed a copy of this agreement with the Clerk of this Court on August 24, 1981, as an appendix to his Brief in Opposition to a Motion of Morton, Ina, David, Mark and Gary Halperin to Intervene and for Other Relief. On June 10, 1980, prior to the Court's action on the petition for certiorari, counsel to the parties had advised the Court that their clients had reached an agreement to liquidate damages, but that there remained a live controversy. Counsel did not include a copy of the agreement in their initial submission.

we recently concluded in a case involving a similar contract, "Given respondents' continued active pursuit of monetary relief, this case remains 'definite and concrete, touching the legal relations of parties having adverse legal interests.'" *Havens Realty Co.* v. *Coleman*, —— U. S. ——, —— (1982), quoting *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240–241 (1937).

III

A

This Court consistently has recognized that government officials are entitled to some form of immunity from suits for civil damages. In *Spalding* v. *Vilas*, 161 U. S. 483 (1896), the Court considered the immunity available to the Postmaster General in a suit for damages based upon his official acts. Drawing upon principles of immunity developed in English cases at common law, the Court concluded that "[t]he interests of the people" required a grant of absolute immunity to public officers. *Id.*, at 498. In the absence of immunity, the Court reasoned, executive officials would hesitate to exercise their discretion in a way "injuriously affect[ing] the claims of particular individuals," *id.*, at 499, even when the public interest required bold and unhesitating action. Considerations of "public policy and convenience" therefore compelled a judicial recognition of immunity from suits arising from official acts.

> "In exercising the functions of his office, the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government, if he were subjected to any such restraint." *Id.*, at 498.

Decisions subsequent to *Spalding* have extended the defense of immunity to actions besides those at common law. In *Tenney* v. *Brandhove*, 341 U. S. 367 (1951), the Court considered whether the passage of 42 U. S. C. §1983, which made no express provision for immunity for any official, had abrogated the privilege accorded to state legislators at common law. *Tenney* held that it had not. Examining §1983 in light of the "presuppositions of our political history" and our heritage of legislative freedom, the Court found it incredible "that Congress . . . would impinge on a tradition so well grounded in history and reason" without some indication of intent more explicit than the general language of the statute. *Id.*, at 376. Similarly, the decision in *Pierson* v. *Ray*, 386 U. S. 547 (1967), involving a §1983 suit against a state judge, recognized the continued validity of the absolute immunity of judges for acts within the judicial role. This was a doctrine "'not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.'" *Id.*, at 554, quoting, *Scott* v. *Stansfield*, L.R. 3 Ex. 220, 223 (1868). See *Bradley* v. *Fisher*, 13 Wall. 335 (1872). The Court in *Pierson* also held that police officers are entitled to a qualified immunity protecting them from suit when their official acts are performed in "good faith." *Id.*, at 557.

In *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974), the Court considered the immunity available to state executive officials in a §1983 suit alleging the violation of constitutional rights. In that case we rejected the officials' claim to absolute immunity under the doctrine of *Spalding* v. *Vilas*, finding instead that state executive officials possessed a "good faith" immunity from §1983 suits alleging constitutional violations. Balancing the purposes of §1983 against the imperatives of public policy, the Court held that "in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of

discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based." 416 U. S., at 247.

As construed by subsequent cases, *Scheuer* established a two-tiered division of immunity defenses in § 1983 suits. To most executive officers *Scheuer* accorded qualified immunity. For them the scope of the defense varied in proportion to the nature of their official functions and the range of decisions that conceivably might be taken in "good faith". This "functional" approach also defined a second tier, however, at which the especially sensitive duties of certain officials—notably judges and prosecutors—required the continued recognition of absolute immunity. See, *e. g.*, *Imbler* v. *Pachtman*, 424 U. S. 409 (1976) (state prosecutors possess absolute immunity with respect to the initiation and pursuit of prosecutions); *Stump* v. *Sparkman*, 435 U. S. 349 (1978) (state judge possesses absolute immunity for all judicial acts).

This approach was reviewed in detail in *Butz* v. *Economou*, 438 U. S. 478 (1978), when we considered for the first time the kind of immunity possessed by *federal* executive officials who are sued for constitutional violations.[25] In *Butz* the Court rejected an argument, based on decisions involving federal officials charged with common law torts, that all high federal officials have a right to absolute immunity from constitutional damage actions. Concluding that a blanket recognition of absolute immunity would be anomalous in light of the qualified immunity standard applied to state executive officials, 438 U. S., at 504, we held that federal officials generally have the same qualified immunity possessed by state officials in cases under § 1983. In so doing we reaffirmed our holdings that some officials, notably judges and prosecutors,

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[25] *Spalding* v. *Vilas*, 161 U. S. 483 (1896), was distinguished on the ground that the suit against the Postmaster General had asserted a common law—and not a constitutional—cause of action. See *Butz*, v. *Economou*, 438 U. S. 478, 493–495 (1978).

"because of the special nature of their responsibilities," *id.*, at 511, "require a full exemption from liability." *Id.*, at 508. In *Butz* itself we upheld a claim of absolute immunity for administrative officials engaged in functions analogous to those of judges and prosecutors. *Ibid.* We also left open the question whether other federal officials could show that "public policy requires an exemption of that scope." *Id.*, at 506.

B

Our decisions concerning the immunity of government officials from civil damages liability have been guided by the Constitution, federal statutes, and history. Additionally, at least in the absence of explicit constitutional or congressional guidance, our immunity decisions have been informed by the common law. See *Butz* v. *Economou*, *supra*, at 508; *Imbler* v. *Pachtman*, 424 U. S. 409, 421 (1976). This Court necessarily also has weighed concerns of public policy, especially as illuminated by our history and the structure of our government. See, *e. g.*, *Butz* v. *Economou*, *supra*, at 508; *Imbler* v. *Pachtman*, *supra*, at 421; *Spalding* v. *Vilas*, *supra*, at 498.[28]

This case now presents the claim that the President of the United States is shielded by absolute immunity from civil damages liability. In the case of the President the inquiries into history and policy, though mandated independently by our cases, tend to converge. Because the Presidency did not exist through most of the development of common law, any historical analysis must draw its evidence primarily from our constitutional heritage and structure. Historical inquiry thus merges almost at its inception with the kind of "public policy" analysis appropriately undertaken by a federal court.

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[28] Although the Court in *Butz* v. *Economou*, *supra*, at 508, described the requisite inquiry as one of "public policy," the focus of inquiry more accurately may be viewed in terms of the "inherent" or "structural" assumptions of our scheme of government.

This inquiry involves policies and principles that may be considered implicit in the nature of the President's office in a system structured to achieve effective government under a constitutionally mandated separation of powers.

IV

Here a former President asserts his immunity from civil damages claims of two kinds. He stands named as a defendant in a direct action under the Constitution and in two statutory actions under federal laws of general applicability. In neither case has Congress taken express legislative action to subject the President to civil liability for his official acts.[37]

Applying the principles of our cases to claims of this kind, we hold that petitioner, as a former President of the United States, is entitled to absolute immunity from damages liability predicated on his official acts. We consider this immu-

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[37] In the present case we therefore are presented only with "implied" causes of action, and we need not address directly the immunity question as it would arise if Congress expressly had created a damages action against the President of the United States. This approach accords with this Court's settled policy of avoiding unnecessary decision of constitutional issues. Reviewing this case under the "collateral order" doctrine, see *supra*, we assume for purposes of this opinion that private causes of action may be inferred both under the First Amendment and the two statutes on which respondent relies. But it does not follow that we must—in considering a *Bivens* remedy or interpreting a statute *in light of the immunity doctrine*—assume that the cause of action runs against the President of the United States. Cf. *Tenney* v. *Brandhove*, 341 U. S. 367, 376 (1951) (construing § 1983 in light of the immunity doctrine, the Court could not accept "that Congress . . . would impinge on a tradition [of legislative immunity] so well grounded in history and reason by covert inclusion in the general language before us," and therefore would not address issues that would arise if Congress had undertaken to deprive state legislators of absolute immunity). Consequently, our holding today need only be that the President is absolutely immune from civil damages liability for his official acts in the absence of explicit affirmative action by Congress. We decide only this constitutional issue, which is necessary to disposition of the case before us.

nity a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history. Justice Story's analysis remains persuasive:

> "There are . . . incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions, which are confided to it. Among these, must necessarily be included the power to perform them. . . . The president cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability." J. Story, Commentaries on the Constitution of the United States, § 1563, at 418–419 (1833 ed.).

A

The President occupies a unique position in the constitutional scheme. Article II of the Constitution provides that "[t]he executive Power shall be vested in a President of the United States. . . ." This grant of authority establishes the President as the chief constitutional officer of the Executive Branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity. These include the enforcement of federal law—it is the President who is charged constitutionally to "take care that the laws be faithfully executed";[28] the conduct of foreign affairs—a realm in which the Court has recognized that "[i]t would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret";[29] and management of the Executive Branch—a task for which "imperative reasons re-

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[28] U. S. Const., Art II, § 3.

[29] *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U. S. 103, 111 (1948).

quir[e] an unrestricted power [in the President] to remove the most important of his subordinates in their most important duties."[30]

In arguing that the President is entitled only to qualified immunity, the respondent relies on cases in which we have recognized immunity of this scope for governors and cabinet officers. *E. g.*, *Butz* v. *Economou*, 438 U. S. 478; *Scheuer* v. *Rhodes*, 416 U. S. 232. We find these cases to be inapposite. The President's unique status under the Constitution distinguishes him from other executive officials.[31]

Because of the singular importance of the President's du-

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[30] *Myers* v. *United States*, 272 U. S. 52, 134–135 (1926).

[31] Noting that the "Speech and Debate Clause" provides a textual basis for congressional immunity, respondent argues that the Framers must be assumed to have rejected any similar grant of Executive immunity. This argument is unpersuasive. First, a specific textual basis has not been considered a prerequisite to the recognition of immunity. No provision expressly confers judicial immunity. Yet the immunity of judges is well settled. See, *e. g.*, *Bradley* v. *Fisher*, 13 Wall 335 (1872); *Stump* v. *Sparkman*, *supra*. Second, this Court already has established that absolute immunity may be extended to certain officials of the Executive Branch. *Butz* v. *Economou*, *supra*, 438 U. S., at 511–512; see *Imbler* v. *Pachtman*, *supra* (extending immunity to prosecutorial officials within the Executive Branch). Third, there is historical evidence from which it may be inferred that the Framers assumed the President's immunity from damages liability. At the Constitutional Convention several delegates expressed concern that subjecting the President even to impeachment would impair his capacity to perform his duties of office. See 2 M. Farrand, Records of the Constitutional Convention of 1787 (1934), at 64 (remarks of Gouvernor Morris); *id.*, at 66 (remarks of Charles Pinckney). The delegates of course did agree to an Impeachment Clause. But nothing in their debates suggests an expectation that the President would be subjected to the distraction of suits by disappointed private citizens. And Senator Maclay has recorded the views of Senator Ellsworth and Vice-President John Adams—both delegates to the Convention—that "the President, personally, was not subject to any process whatever. . . . For [that] would put it in the power of a common justice to exercise any authority over him, and stop the whole machine of government." W. Maclay, Journal of W. Maclay 167 (E. Maclay ed. 1890). Justice Story, writing in 1833, held it implicit in the separation of powers that the President must be permitted to discharge his

ties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government. As is the case with prosecutors and judges—for whom absolute immunity now is established—a President

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duties undistracted by private lawsuits. J. Story, Commentaries on the Constitution of the United States, § 1563, at 418–419 (1833 ed.) (quoted *supra*). Thomas Jefferson also argued that the President was not intended to be subject to judicial process. When Chief Justice Marshall held in *United States* v. *Burr*, 25 Fed. Cas. 30 (1807), that a subpoena duces tecum can be issued to a President, Jefferson protested strongly, and stated his broader view of the proper relationship between the Judiciary and the President:

"The leading principle of our Constitution is the independence of the Legislature, executive and judiciary of each other, and none are more jealous of this than the judiciary. But would the executive be independent of the judiciary, if he were subject to the *commands* of the latter, & to imprisonment for disobedience: if the several courts could bandy him from pillar to post, keep him constantly trudging from north to south & east to west, and withdraw him entirely from his constitutional duties? The intention of the Constitution, that each branch should be independent of the others, is further manifested by the means it has furnished to each, to protect itself from enterprises of force attempted on them by the others, and to none has it given more effectual or diversified means than to the executive." 10 The Works of Thomas Jefferson 404. (P. Ford ed. 1905) (quoting a letter from President Jefferson to a prosecutor at the Burr trial) (emphasis in the original). See also 5 D. Malone, Jefferson and His Time: Jefferson the President 320–325 (1974).

In light of the fragmentary character of the most important materials reflecting the Framers' intent, we do think that the most compelling arguments arise from the Constitution's separation of powers and the judiciary's historic understanding of that doctrine. See text *supra*. But our primary reliance on constitutional structure and judicial precedent should not be misunderstood. The best historical evidence clearly supports the Presidential immunity we have upheld. Justice White's dissent cites some other materials, including ambiguous comments made at state ratifying conventions and the remarks of a single publicist. But historical evidence must be weighed as well as cited. When the weight of evidence is considered, we think we must place our reliance on the contemporary understanding of John Adams, Thomas Jefferson, and Oliver Ellsworth. Other powerful support derives from the actual history of private lawsuits against the President. Prior to the litigation explosion commencing with

must concern himself with matters likely to "arouse the most intense feelings." *Pierson* v. *Ray*, *supra*, 386 U. S., at 554. Yet, as our decisions have recognized, it is in precisely such cases that there exists the greatest public interest in providing an official "the maximum ability to deal fearlessly and impartially with" the duties of his office. *Ferri* v. *Ackerman*, 444 U. S. 193, 203 (1979) (footnote omitted). This concern is compelling where the officeholder must make the most sensitive and far-reaching decisions entrusted to any official under our constitutional system.[32] Nor can the sheer prominence of the President's office be ignored. In view of the visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for suits for civil damages.[33] Cognizance of this personal vulnerability frequently could distract a President from his public duties, to the detriment not only of the President and his office but also the Nation that the Presidency was designed to serve.

B

Courts traditionally have recognized the President's constitutional responsibilities and status as factors counselling

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this Court's 1971 *Bivens* decision, fewer than a handful of damages action ever were filed against the President. None appears to have proceeded to judgment on the merits.

[32] Among the most persuasive reasons supporting official immunity is the prospect that damages liability may render an official unduly cautious in the discharge of his official duties. As Judge Learned Hand wrote in *Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (CA2 1949), cert denied, 339 U. S. 949 (1950), "[t]he justification for . . . [denying recovery] is that it is impossible to know whether the claim is well founded until the case has been tried, and to submit all officials, the innocent as well as the guilty, to the burden of trial and the danger of its outcome would dampen the ardor of all but the most resolute. . . ."

[33] These dangers are significant even though there is no historical record of numerous suits against the President, since a right to sue federal officials for damages for constitutional violations was not even recognized until *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971).

judicial deference and restraint.[34] For example, while courts generally have looked to the common law to determine the scope of an official's evidentiary privilege,[35] we have recognized that the Presidential privilege is "rooted in the separation of powers under the Constitution." *United States* v. *Nixon*, 418 U. S. 683, 708 (1974). It is settled law that the separation of powers doctrine does not bar every exercise of jurisdiction over the President of the United States. See, *e. g.*, *United States* v. *Nixon*, *supra*; *United States* v. *Burr*, 25 Fed. Cases 191, 196 (1807); cf. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952).[36] But our cases also have established that a court, before exercising jurisdiction, must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch. See *Nixon* v. *General Services Administration*, 433 U. S. 425, 443 (1977); *United States* v. *Nixon*, 418 U. S. 683, 703–713 (1974). When judicial action is needed to serve broad public interests—as when the Court acts, not in derogation of the separation of powers, but to maintain their proper balance, cf. *Youngstown Sheet &*

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[34] This tradition can be traced far back into our constitutional history. See, *e. g.*, *Mississippi* v. *Johnson*, 71 U. S. 475, 501 (1866), ("[W]e are fully satisfied that this court has no jurisidiction of a bill to enjoin the President in the performance of his official duties; and that no such bill ought to be received by us."); *Kendall* v. *United States*, 12 Pet. 524, 610 (1838) ("The executive power is vested in a President; and as far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeaching power.").

[35] See *United States* v. *Reynolds*, 345 U. S. 1, 6–7 (1953) (Secretary of the Air Force); *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 323–324 (DDC 1966), aff'd, 384 F. 2d 979 (CADC), cert denied, 389 U. S. 952 (1967) (Department of Justice officials).

[36] Although the President was not a party, the Court enjoined the Secretary of Commerce from executing a direct Presidential order. See 343 U. S., at 583.

Tube Co. v. *Sawyer*, *supra*, or to vindicate the public interest in an ongoing criminal prosecution, see *United States* v. *Nixon*, *supra*—the exercise of jurisdiction has been held warranted. In the case of this merely private suit for damages based on a President's official acts, we hold it is not.[37]

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[37] The Court has recognized before that there is a lesser public interest in actions for civil damages than, for example, in criminal prosecutions. See *United States* v. *Gillock*, 445 U. S. 360, 371–373 (1980); cf. *United States* v. *Nixon*, 418 U. S., at 711–712 and n. 19 (basing holding on special importance of evidence in a criminal trial and distinguishing civil actions as raising different questions not presented for decision). It never has been denied that absolute immunity may impose a regrettable cost on individuals whose rights have been violated. But, contrary to the suggestion of JUSTICE WHITE's dissent, it is not true that our jurisprudence ordinarily supplies a remedy in civil damages for every legal wrong. The dissent's objections on this ground would weigh equally against absolute immunity for any official. Yet the dissent makes no attack on the absolute immunity recognized for judges and prosecutors.

Our implied-rights-of-action cases identify another area of the law in which there is not a damages remedy for every legal wrong. These cases establish that victims of statutory crimes ordinarily may not sue in federal court in the absence of expressed congressional intent to provide a damages remedy. See, *e. g.*, *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, —— U. S. —— (1982); *Middlesex County Sewerage Auth.* v. *National Sea Clammers Assn.*, 453 U. S. 1 (1981); *California* v. *Sierra Club*, 451 U. S. 287 (1981). JUSTICE WHITE does not refer to the jurisprudence of implied rights of action. Finally, the dissent undertakes no discussion of cases in the *Bivens* line in which this Court has suggested that that there would be no damages relief in circumstances "counselling hesitation" by the judiciary. See *Bivens* v. *Six Unknown Federal Agents*, 403 U. S., at 396; *Carlson* v. *Green*, 446 U. S., at 19 (in direct constitutional actions against officials with "independent status in our constitutional scheme . . . judicially created remedies . . . might be inappropriate").

Even the case on which JUSTICE WHITE places principal reliance, *Marbury* v. *Madison*, 1 Cranch 137 (1803), provides dubious support at best. The dissent cites *Marbury* for the proposition that "The very essence of civil liberty consists in the right of the individual to claim the protection of the laws, whenever he receives an injury." *Id.*, at 163. Yet *Marbury* does not establish that the individual's protection must come in the form of a particular remedy. Marbury, it should be remembered, *lost*

C

In defining the scope of an official's absolute privilege, this Court has recognized that the sphere of protected action must be related closely to the immunity's justifying purposes. Frequently our decisions have held that an official's absolute immunity should extend only to acts in performance of particular functions of his office. See *Butz* v. *Economou*, 438 U. S., at 508–517; cf. *Imbler* v. *Pachtman*, 424 U. S., at 430–431. But the Court also has refused to draw lines finer than history and reason would support. See, *e. g.*, *Spalding* v. *Vilas*, 161 U. S., at 498 (privilege extends to all matters "committed by law to [an official's] control or supervision"); *Barr* v. *Matteo*, 360 U. S., at 575 (fact "that the action here taken was within the outer perimeter of petitioner's line of duty is enough to render the privilege applicable. . . ."); *Stump* v. *Sparkman*, 435 U. S., at 363 and n. 12 (judicial privilege applies even to acts occurring outside "the normal attributes of a judicial proceeding"). In view of the special nature of the President's constitutional office and functions, we think it appropriate to recognize absolute Presidential immunity from damages liability for acts within the "outer perimeter" of his official responsibility.

Under the Constitution and laws of the United States the President has discretionary responsibilities in a broad variety of areas, many of them highly sensitive. In many cases it would be difficult to determine which Presidential "function" encompassed a particular action. In this case, for example, respondent argues that he was dismissed in retaliation for his testimony to Congress—a violation of 5 U. S. C. §7211 and

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his case in the Supreme Court. The Court turned him away with the suggestion that he should have gone elsewhere with his claim. In this case it was clear at least that Fitzgerald was entitled to seek a remedy before the Civil Service Commission—a remedy of which he availed himself. See *supra*, at 4–6 and n. 17.

18 U. S. C. § 1505. The Air Force, however, has claimed that the underlying reorganization was undertaken to promote efficiency. Assuming that the petitioner Nixon ordered the reorganization in which respondent lost his job, an inquiry into the President's motives could not be avoided under the kind of "functional" theory asserted both by respondent and the dissent. Inquiries of this kind could be highly intrusive.

omission

Here respondent argues that petitioner Nixon would have acted outside the outer perimeter of his duties by ordering the discharge of an employee who was lawfully entitled to retain his job in the absence of "such cause as will promote the efficiency of the service." Brief for Respondent 39, citing 5 U. S. C. § 7512(a). Because Congress has granted this legislative protection, respondent argues, no federal official could, within the outer perimeter of his authority, cause Fitzgerald to be dismissed without satisfying this standard in prescribed statutory proceedings.

This construction would subject the President to trial on virtually every allegation that an action was unlawful, or was taken for a forbidden purpose. Adoption of this construction thus would deprive absolute immunity of its intended effect. It clearly is within the President's constitutional and statutory authority to "prescribe" the manner in which the Secretary will "conduct the business" of the Air Force. See 10 U. S. C. § 8012(b). Because this mandate must include the authority to prescribe reorganizations and reductions in force, we conclude that petitioner's alleged wrongful acts lay well within the outer perimeter of his authority.

V

A rule of absolute immunity for the President will not leave the Nation without sufficient protection against misconduct on the part of the chief executive.[38] There remains the con-

[38] The presence of alternative remedies has played an important role in

stitutional remedy of impeachment.[39] In addition, there are formal and informal checks on Presidential action that do not apply with equal force to other executive officials. The President is subjected to constant scrutiny by the press. Vigilant oversight by Congress also may serve to deter Presidential abuses of office, as well as to make credible the threat of impeachment.[40] Other incentives to avoid misconduct may include a desire to earn re-election, the need to maintain prestige as an element of Presidential influence, and a President's traditional concern for his historical stature.

The existence of alternative remedies and deterrents establishes that absolute immunity will not place the President "above the law."[41] For the President, as for judges and

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our previous decisions in the area of official immunity. *E. g., Imbler* v. *Pachtman*, 424 U. S., at 428–429 ("We emphasize that the immunity of prosecutors from liability in suits under § 1983 does not leave the public powerless to deter misconduct or to punish that which occurs.").

[39] The same remedy plays a central role with respect to the misconduct of federal judges, who also possess absolute immunity. See Kaufman, Chilling Judicial Independence, 88 Yale L.J. 681, 690–706 (1979). Congressmen may be removed from office by a vote of their colleagues. U. S. Const., Art. I, § 5, cl. 2.

[40] Prior to petitioner Nixon's resignation from office, the House Judiciary Committee had convened impeachment hearings. See generally Report of the Committee on the Judiciary of the House of Representatives: Impeachment of Richard M. Nixon President of the United States, H.R. Rep. No. 93–1305 (1974).

[41] The argument of the dissenting opinions, that our decision places the President "above the law," is rhetorically chilling but wholly unjustified. The remedy of impeachment demonstrates that the President remains accountable under law for his misdeeds in office. This case involves only a damages remedy. Although the President is not liable in civil damages for official misbehavior, that does not lift him "above" the law. The dissent does not suggest that a judge is "above" the law when he enters a judgment for which he cannot be held answerable in civil damages; or a prosecutor is above the law when he files an indictment; or a Congressman is above the law when he engages in legislative speech or debate. It is simple error to characterize an official as "above the law" because a particular

prosecutors, absolute immunity merely precludes a particular private remedy for alleged misconduct in order to advance compelling public ends.

VI

For the reasons stated in this opinion, the decision of the Court of Appeals is reversed and the case remanded for action consistent with this opinion.

So ordered.

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remedy is not available against him.

L.F.P.
Reviewed
1/30/82

January 29, 1982

No. 79-1738

FIRST DRAFT

The plaintiff in this lawsuit seeks relief in civil damages from a former President of the United States. The claim rests on actions allegedly taken during the former President's tenure in office. The issue before us is the scope of the immunity possessed by the President of the United States.

I

In January 1970 the respondent A. Ernest Fitzgerald lost his job as a management analyst with the Department of the Air Force. Fitzgerald's dismissal occurred in the

context of a departmental reorganization and reduction in force, in which his job was eliminated. In announcing the reorganization, the the Air Force characterized the action as taken to promote economy and efficiency in the armed forces.

Respondent's discharge attracted unusual attention in Congress and in the press. Fitzgerald had attained national prominence approximately one year earlier, during the waning months of the presidency of Lyndon B. Johnson. On November 13, 1968, Fitzgerald appeared before the Subcommittee for Economy in Government of the Joint Economic Committee of the United States Congress. To the apparent embarrassment of his superiors in the Department of Defense, Fitzgerald testified that cost-overruns on the C-5A transport plane could approximate $2 billion.[1] He

[1]See Economics of Military Procurement: Hearings Before the Subcommittee on Economy in Government of the Joint Economic Comm., 90th Cong., 2d Sess. 199-201 (1968-1969). It is not disputed that officials in the Department of Defense were both embarrassed and angered by Fitzgerald's testimony. Within less than two months of respondent's congressional appearance, staff had prepared a memorandum for the outgoing Secretary of the Air Force, Harold Brown, listing three ways in which Fitzgerald might be removed from his position. See Joint Appendix (JA), at 209-211 (Memorandum of John Lang to Harold Brown, Jan. 6, 1969). Among these was a "reduction in force"--the means by which Fitzgerald ultimately was removed by Brown's successor in office under the new Nixon administration.

also revealed that unexpected technical difficulties had arisen during the development of the aircraft.

Concerned that Fitzgerald might have suffered retaliation for his congressional testimony, the Subcommittee on Economy in Government convened public hearings on Fitzgerald's dismissal.[2] The press reported those hearings prominently, as it had the earlier announcement of his impending separation from the Department of Defense. At a news conference on December 8, 1969, President Richard Nixon was queried about Fitzgerald's impending separation from government service.[3] The President responded by promising to look into the matter.[4] Evidence in the record establishes that

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[2]See The Dismissal of A. Ernest Fitzgerald by the Department of Defense: Hearings Before the Subcomm. on Economy in Government of the Joint Economic Comm., 91st Cong., 1st Sess. (1969). Some 60 Members of Congress also signed a letter to the President protesting the "firing of this dedicated public servant" as a "punitive action." Ibid., at 115, JA, at 177-179.

[3]A briefing memorandum on the Fitzgerald matter had been prepared by White House staff in anticipation of a possible inquiry at the forthcoming press conference. Authored by aide Patrick Buchanan, it advanced the view that the Air Force was "firing ... a good public servant." JA, at 269 (Memorandum of Patrick Buchanan to Richard Nixon, December 5, 1969). The memorandum suggested that the President order Fitzgerald's retention by the Defense Department.

[4]JA, at 228.

this pledge was kept. Shortly after the news conference the President asked White House Chief of Staff H.R. Haldeman to arrange for Fitzgerald's assignment to another job within the Administration.[5] It also appears that the President suggested to Budget Director Robert Mayo that Fitzgerald might be offered a position in the Bureau of the Budget.[6]

Fitzgerald's proposed reassignment encountered resistance within the Administration.[7] In an internal memordandum of January 20, 1970, White House aide Alexander Butterfield reported to chief-of staff Haldeman that "Fitzgerald is no doubt a top-notch cost expert, but he must be given very low marks in loyalty; and after all,

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[5]See JA, at 109-112 (Deposition of H.R. Haldeman, February 7, 1980); JA, at 137-141 (Deposition of petitioner Richard Nixon, October 2-3, 1979). Haldeman's deposed testimony was based on his handwritten notes of December 12, 1969. JA, at 275.

[6]See JA, at 126 (Deposition of Robert Mayo); JA, at 141 (Deposition of Richard Nixon).

[7]Both Mayo and his deputy, James Schlesinger, appear to have resisted at least partly due to a suspicion that Fitzgerald lacked institutional loyalty to Executive policies and that he spoke too freely in communications with friends on Capitol Hill. Both also stated that high level positions were presently unavailable within the Bureau of the Budget. See JA, at 126 (Deposition of Robert Mayo); JA, at 146-147 (Deposition of James Schlesinger).

loyalty is the name of the game."[8] Butterfield therefore recommended that "We should let him bleed, for a while at least."[9] There is no evidence of White House efforts to reemploy Fitzgerald subsequent to the Butterfield memorandum.

Absent any offer of alternative federal employment, Fitzgerald complained to the Civil Service Commission (CSC). In a letter of January 20, 1970, he alleged that his separation represented unlawful retaliation for his truthful testomony before a congressional committee.[10]

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[8]Quoted in Decision of Civil Service Commission Chief Appeals Examiner (CSC Decision), JA, at 60, 84 (September 18, 1973).

[9]Id., at 85. The memorandum added that "We owe 'first choice on Fitzgerald' to [Senator] Proxmire and others who tried so hard to make him a hero [for exposing the cost overruns]." Suspicion of Fitzgerald's assumed loyalty toward Senator Proxmire was widely shared in the White House and in the Defense Department. According to the CSC Decision, supra, JA, at 83:

> "While Mr. Fitzgerald has denied that he was 'Senator Proxmire's boy in the Air Force,' and he may honestly believe it, we find this statement difficult to accept. It is evident that the top officials in the Air Force, without specifically saying so, considered him to be just that.... We also note that upon leaving the Air Force Mr. Fitzgerald was employed as a consultant by the Proxmire Committee and that Senator Proxmire appeared at the Commission hearing as a character witness for [Fitzgerald]."

[10]See CSC Decision, JA, at 61.

The CSC convened a closed hearing on Fitzgerald's allegations on May 4, 1971. Fitzgerald, however, preferred to present his grievances in public. After he had won a judicial injunction, Fitzgerald v. Hampton, 467 F.2d 755 (1972), public hearings commenced on January 26, 1973. The hearings again generated publicity, much of it devoted to the testimony of Air Force Secretary Robert Seamans. Although he denied that Fitzgerald had lost his position in retaliation for congressional testimony, Seamans testified that he had discussed Fitzgerald's loss of employment with one or more White House officials.[11] But the Secretary declined to be more specific. He responded to several questions by invoking "executive privilege."[12]

At a news conference on January 31, 1973, the President was asked about Mr. Seamans' testimony. Mr. Nixon took the opportunity to assume personal responsibility for Fitzgerald's dismissal:

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[11]See ibid., JA, at 83-84.

[12]See id.

> "I was totally aware that Mr. Fitzgerald would be fired or discharged or asked to resign. I approved it and Mr. Seamans must have been talking to someone who had discussed the matter with me. No, this was not a case of some person down the line deciding he should go. It was a decision that was submitted to me. I made it and I stick by it."[13]

A day later, however, the White House press office issued a retraction of the President's statement. According to a press spokesman, the President had confused Fitzgerald with another former executive employee. On behalf of the President, the spokesman asserted that Mr. Nixon ~~did~~ had not have "put before him the decision concerning Mr. Fitzgerald."[14]

After hearing over 4,000 pages of testimony, the chief examiner for the CSC issued his decision in the Fitzgerald case on September 18, 1973. Decision on the Appeal of A. Ernest Fitzgerald, JA, at 60. The Examiner held that Fitzgerald's dismissal had offended applicable civil service regulations. Ibid., JA, at 96-97. The

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[13] JA, at 185.

[14] JA, at 196 (transcription of statement of White House press secretary Ronald Ziegler, Feb. 2, 1973).

Examiner based this conclusion on a finding that the Departmental reorganization in which Fitzgerald lost his job, though purportedly implemented as an economy measure, was in fact motivated by "reasons purely personal to" respondent. Id. As this was an impermissible basis for a reduction in force,[15] the Examiner recommended Fitzgerald's reappointment to his old position or to a job of comparable authority. The Examiner, however, explicitly distinguished this narrow conclusion from a suggested finding that Fitzgerald had suffered retaliation for his testimony to Congress. As found by the Commission, "the evidence in the record does not support [Fitzgerald's] allegation that his position was abolished and that he was separated ... in retaliation for his

[15]The Examiner found that Fitzgerald in fact was dismissed because of his superiors' dissatisfaction with his job performance. CSC Decision, JA, at 86-87. Their attitude was evidenced by "statements that he was not a 'team player' and 'not on the Air Force team.'" Ibid., JA, at 83. Without deciding whether this would have been an adequate basis for an "adverse action" against Fitzgerald as an "inadequate or unsatisfactory employee," ibid., at 68, the Examiner held that the CSC's adverse action procedures, current version codified at 5 C.F.R. § 752, implicitly forbade the Air Force to employ a "reduction in force" as a means of dismissing respondent for reasons "personal to" him. Ibid., JA, at 87. As the Air Force had used this forbidden means of securing Fitzgerald's separation from the service, he was found entitled to reinstatement.

having revealed the C-5A cost overrun in testimony before the Proxmire Committee on November 13, 1968." Ibid., at 81.

Following the Commission's decision, Fitzgerald filed a suit for damages in the district court. In it he raised essentially the same claims presented to the CSC.[16] As defendants he named eight officials of the Defense Department, White House aide Alexander Butterfield, and "one or More" unnamed "White House Aides" styled only as "John Does."

The District Court dismissed the action under the District of Columbia's three-year statute of limitations, Fitzgerald v. Seamans, 384 F. Supp. 688 (D.D.C. 1974), and the Court of Appeals affirmed as to all but one defendant, White House aide Alexander Butterfield, Fitzgerald v. Seamans, 553 F.2d 220 (CADC 1977). The Court of Appeals reasoned that Fitzgerald had no reason to suspect White

[16]The complaint alleged a continuing conspiracy to deprive him of his job and sully his reputation. Fitzgerald alleged that the conspiracy had continued through the CSC hearings and remained in existence at the initiation of the lawsuit. See Fitzgerald v. Seamans, supra, 384 F. Supp., at 690-691.

House involvement in his dimissal at least until 1973. In that year, reasonable grounds for suspicion had arisen, most notably through publication of the internal White House memorandum in which Butterfield had recommended that Fitzgerald at least should be made to "bleed for a while" before being offered another job in the Administration. 553 F.2d, at 225, 229. Holding that concealment of illegal activity would toll the statute of limitations, the Court of Appeals remanded the action against Butterfield for further proceedings in the District Court.

Following the remand and extensive discovery thereafter, Fitzgerald filed a Second Amended Complaint in the District Court on July 5, 1978. It was in this amended complaint--more than eight years after he had first complained of his discharge to the Civil Service Commission--that Fitzgerald first named the petitioner Nixon as a party defendant.[17] Also included as defendants

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[17] The general allegations of the complaint remained essentially unchanged. In averring Nixon's participation in the alleged conspiracy against him, the complaint quoted petitioner's press conference statement that he was "totally aware" of and in fact "approved" Fitzgerald's dismissal. Second Amended Complaint, at 6.

were White House aide Bryce Harlow and other officials of the Nixon administration. Additional discovery ensued. By March 1980, only three defendants remained: the petitioner Richard Nixon and White House aides Bryce Harlow and Alexander Butterfield. Denying a motion for summary judgment, the District Court ruled that the action must proceed to trial. Its order of March 26 held that Fitzgerald had stated triable causes of action under ~~under~~ two federal statutes and the First Amendment to the Constitution.[18] The Court also ruled that petitioner was not entitled to claim absolute presidential immunity.

Petitioner took a collateral appeal of the immunity

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[18] See Appendix to Petition for Certiorari, at 1a-2a. The District Court held that respondent was entitled to "infer" a cause of action under 5 U.S.C. § 7211 (Supp. III 1979) and 18 U.S.C. § 1505. Neither expressly confers a private right to sue for relief in damages. The first, 5 U.S.C. § 7211 (Supp. III 1979), provides generally that "The right of employees ... to ... provide information to either House of Congress, or a committee or a Member thereof shall not be interfered with or denied." The second, 18 U.S.C. § 1505, is a criminal statute making it a crime to obstruct congressional testimony. The correctness of the decision that a cause of action could be "implied" under these statutes is not currently before us. As explained infra, this case is here under the "collateral order" doctrine, for review of the District Court's denial of petitioner's motion to dismiss on the ground that he enjoyed absolute immunity from civil suit. The District Court also held that respondent had stated a claim under the common law of the District of Columbia, but respondent subsequently abandoned his common law claim, however, and we are not presented with any issue of immunity under the common law of District of Columbia.

Duck-print Here redundant - of the subsequent claim now been abandoned.

Neither is the question whether the Courts, properly may under the direct authority of the First Amendment, infer a private action against the President for relief in damages.

decision to the Court of Appeals for the District of Columbia Circuit. The Court of Appeals dismissed summarily. It apparently did so on the ground that its recent decision in Halperin v. Kissinger, 606 F.2d 1192 (CADC 1979), aff'd by an equally divided vote, ____ U.S. ____(1981), had decisively rejected this claimed immunity defense and that the appeal therefore failed to present a substantial question under the law of the Circuit.

As this Court has not ruled on the scope of immunity available to a President of the United States, we granted certiori to decide this important issue. ____ U.S. ____ (1981).

II

Before addressing the merits of this case, we must consider two challenges to our jurisdiction. In his opposition to the petition for certiorari, respondent argued that the District Court had not yet entered any appealable order. ~~In the absence of a final judgment, he~~ Emphasizing that the Court of Appeals had dismissed ~~the~~ petitioners interlocutory appeal for lack of jurisdiction, he contended that there was no "case" ~~yet~~ ripe for review by ~~the Court of Appeals~~ this Court.[19] We also must consider an argument that an

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Footnote(s) 19 will appear on following pages.

agreement between the parties has mooted the controversy. 195

A

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254, a statute that invests us with authority to review cases "in" the Court of Appeals.[20] In this case, the Court of Appeals dismissed petitioner's appeal for lack of jurisdiction. Emphasizing the "jurisdictional" basis for the Court of Appeals' decision, respondent has argued that this case was never "in" the Court of Appeals within the meaning of § 1254. As a result, respondent has argued, this Court is without 205 jurisdiction to review the action of the lower court. This novel analysis is without merit.

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[19] See Brief for Respondent in Opposition, at 2. Although respondent has not repeated this argument in his brief on the merits, the challenge was jurisdictional. As jurisdictional questions cannot be waived by the parties, we think it appropriate to discuss the issue raised at that stage of the litigation.

[20] The statute provides in pertinent part:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree....

28 U.S.C. § 1254.

Under the "collateral order" doctrine of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), a small class of interlocutory orders are immediately appealable to the courts of appeals. This class embraces orders that "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and [are] effectively unreviewable on appeal from a final judgment." Cooper & Lybrand v. Livesay, 437 U.S. 463, 464 (1978); see Cohen, supra, 337 U.S., at 546-547. At least twice before this Court has held that orders denying claims of absolute immunity are appealable under these criteria. See Helstoski v. Meanor, 442 U.S. 500 (1979) (claim of immunity under the Speech and Debate Clause); Abney v. United States, 431 U.S. 651 (1977) (claim of immunity under Double Jeopardy Clause). Because the denial of petitioner's claim of immunity represented a collateral order appealable under the Cohen doctrine, this case was "in" the Court of Appeals within the meaning of the statute and is currently ripe for our review.[21]

Footnote(s) 21 will appear on following pages.

B

Shortly after petitioner had filed his petition for ceriorari in this Court and respondent had entered his opposition, the parties reached an agreement to liquidate damages.[22] Under its terms, the petitioner Nixon paid the respondent Fitzgerald ~~a sum of~~ $142,000. In consideration, Fitzgerald agreed to accept liquidated damages in the sum of $28,000 in the event of a ruling by this Court that petitioner was not entitled to absolute immunity. In case of a decision upholding petitioner's immunity claim, no further payments would ~~occur~~ be made.

The limited agreement between the parties left both petitioner and respondent with a considerable financial

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[21]There can be no serious doubt concerning our power to review a court of appeals' decision to dismiss for lack of jurisdiction--a power we have exercised routinely. See, e.g., Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478 (1978). If we lacked authority to do so, decisions to dismiss for want of jurisdiction would be insulated entirely from review by this Court.

[22]Respondent filed a copy of this agreement with the Clerk of this Court on August 24, 1981, as an appendix to his Brief in Opposition to a Motion of Morton, Ina, David, Mark and Gary Halperin to Intervene and for Other Relief. On June 10, 1980--prior to the Court's action on the petition for certiorari, counsel to the parties had advised the Court that their clients had reached an agreement to liquidate damages, but that there remained a live controversy. Counsel did not include a copy of the agreement in their initial submission.

stake in the resolution of the question presented in this Court. As we recently concluded in a case involving a similar contract, "Given respondents' continued active pursuit of monetary relief, this case remains 'definite and concrete, touching the legal relations of parties having adverse legal interests.'" Havens Realty Co. v. Coleman, draft op., at 6, quoting Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-241 (1937).

III

This Court consistently has recognized that government officials are entitled to some form of immunity from suits for civil damages. In Spalding v. Vilas, 161 U.S. 483 (1896), the Court considered the immunity available to the Postmaster General in a suit for damages based upon his official acts. Relying heavily on English cases at common law, the Court concluded that "[t]he interests of the people," id., at 498, required a grant of absolute immunity to public officers. In the absence of immunity, the Court reasoned, executive officials would hesitate to exercise their discretion in a way "injuriously affect[ing] the claims of particular

individuals," id., at 499, even when the public interest required bold and unhesitating action. Considerations of "public policy and convenience" therefore compelled a judicial recognition of immunity from suits arising from official acts.

> "In exercising the functions of his office, the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government, if he were subject to any such restraint."

Id., at 498.

Decisions subsequent to Spalding have extended the defense of immunity to actions besides those at common law. Tenney v. Brandhove, 341 U.S. 367 (1951), held that the passage of 42 U.S.C. § 1983 had not abrogated the common-law ~~privilege~~ immunity accorded to state legislators. And the decision in Pierson v. Ray, 386 U.S. 547 (1967), similarly affirmed the extension under § 1983 of the absolute immunity historically ~~accorded~~ granted to judges. Pierson also held that police officers possess a qualified immunity protecting them from suit when their official acts are performed in "good faith." Id., at 556.

Was Tenney a "privilege" case. I've not framed to read it. I know that sometimes "privilege" + "immunity" mean the same thing - but not always. E.g. privilege not to disclose info.

Deck - Some of language in last Term (Version I) discussion of Scheuer is good. See p 4,5 of your alternative draft.

In Scheuer v. Rhodes, 416 U.S. 232 (1974), the Court maybe this should be saved for considered the immunity properly afforded state executive Butterfield officials in a § 1983 suit alleging the violation of constitutional rights. In that case we rejected the officials' claim to absolute immunity under the doctrine 295 of Spalding v. Vilas, holding that state executive officials possessed only a "good faith" immunity from suits alleging constitutional violations.

The approach adopted in Scheuer and subsequent cases arguably narrowed the "official acts" doctrine recognized 300 in Spalding v. Vilas. As consrued by subsequent cases, Scheuer mandated a two-tiered division of immunity defenses. To most executive officers Scheuer accorded qualified immunity. For them the scope of the defense varied in proportion to the nature of their official 305 functions and the range of decisions that conceivably might be taken in "good faith": "[S]ince the options which a chief executive and his principal subordinates must consider are far broader and far more subtle than those made by officials with less responsibility, the range of 310 discretion must be comparably broad." This "functional"

approach also defined a second tier, however, at which the especially sensitive functions of a few officials--notably judges and prosecutors--required the continued recognition of absolute immunity. See, e.g., Imbler v. Pachtman, 424 U.S. 409 (1976) (state prosecutors possess absolute immunity with respect to the initiation and pursuit of prosecutions); Stump v. Sparkman, 435 U.S. 349 (1978) (state judge possesses absolute immunity for all judicial acts).

In Butz v. Economou, 438 U.S. 478 (1978), the Court considered for the first time the kind of immunity possessed by federal executive officials who are sued for constitutional violations. In Butz, the Court rejected an argument, based on decisions involving federal officials charged with common law torts, that all high federal officials should be accorded absolute immunity from constitutional damage actions. Concluding that a blanket grant of absolute immunity would be anomolous in light of the qualified immunity standard applied to state executive officials, 438 U.S., at 504, and "would seriously erode the protection provided by basic constitutional

guarantees," id., at 508, we extended the approach to immunity questions that we had applied in suits against state officials in cases under § 1983. In so doing we reaffirmed our holdings that some officials, notably judges and prosecutors, have "special functions requir[ing] a full exemption from liability." Id., at 508. In Butz itself we accorded absolute immunity to administrative officials engaged in functions analogous to those of judges and prosecutors. Id. We also left open the ~~possibility that~~ question whether other federal officials ~~might~~ could show that "public policy requires an exemption of that scope." Id at ___.

This case now presents the claim that public policy ~~requires the extension of absolute immunity to~~ granting the President of the United States, is shielded by absolute immunity from civil damage suit ~~is protected~~ by absolute immunity from civil damage suit substitute

IV

In addressing claims of entitlement to immunity, this Court has recognized that "the law of privilege as a defense to damage actions against officers of Government has 'in large part been of judicial making.'" Butz v. Economou, supra, 438 U.S., at 501-502, quoting Barr v. Matteo, 360 U.S. 564, 569 (1959); Doe v. McMillan, 412

U.S. 306, 318 (1973). This is not to say that our decisions have not been rooted in federal statutes or the Constitution. Our cases under § 1983 formally have involved ~~exercises in~~ statutory construction. See, e.g., Tenney v. Brandhove, 341 U.S. 367 (1951). Other decisions have ~~been rooted~~ rested either on the literal text of the Constitution, e.g., Powell v. McCormack, 395 U.S. 486, 506 (1969) (recognizing immunity of Congressmen under Speech and Debate Clause), or on inferences of constitutional purpose drawn from constitutional language and structure, e.g., Gravel v. United States, 408 606, 418 (1972) (extending congressional immunity to a congressional aide, in order to "implement [the] fundamental purpose" of the Speech and Debate Clause); cf. Butz v. Economou, supra, 438 U.S., at 508-517. Nonetheless, at least in the absence of ~~clear~~ explicit guidance from the Congress, in deciding immunity questions we have

element of our immunity inquiries we also have examined the scope of the immunity historically afforded to particular officials at common law. See Butz v. Economou, supra, 438 U.S., at 508; Imbler v. Pachtman, 424 U.S. 409, 421 (1976). 375

In the case of the President the [redacted] historical and policy inquiries tend to converge. Because the presidency did not exist through most of the development of common law, any historical analysis must draw its evidence primarily from our constitutional structure and heritage.[24] From both sources The relevant ~~history~~ evidence 380

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render officials unduly cautious in the discharge of their public responsibilities. See Gregoire v. Biddle, 177 F. 2d 579, 581 (CA2 1949), cert. denied, 339 U.S. 949 (1950). Second, competent and responsible individuals may be deterred from entering public service in the first place. Third, public servants may be distracted from their duties by the need to defend frequent lawsuits. Finally, as this case illustrates, there is a danger of unfairness when officials face personal liability for decisions made in areas of legal uncertainty that are reviewed by courts years later, under evolving legal standards. See generally Freed, Executive Official Immunity for Constitutional Violations: An Analysis and a Critique, 72 Nw. L. Rev. 526, 529-530 (1977).

[24] Although there has been some ~~controversy~~ difference of view over this issue, it generally is agreed that high executive officials enjoyed absolute immunity at common law. See,

reveals

as against these considerations that The right of petitioners to assert claims under the Const. & laws of the U.S. implicates a strong public and often contrary considerations to the continuing effort to identify and implement appropriate separation -- an effort of powers among the branches of government in part animated and in part defined by an inquiry into the requisites of public policy. The importance of individual rights also identifies a powerful policy concern in suits arising under the Constitution and laws of the United States. But we consistently have held that fundamental interests of national policy justify the immunity of some officials even from suits of that kind.

Bivens See Note

In this case a former President asserts immunity from civil damage claims of two kinds. He stands named as a defendant in a direct action under the Constitution and two statutory actions under federal laws of general applicability. In neither case has Congress taken express legislative action to subject the President to civil liability for his official acts.

Dick - should we not have a note saying the Const claims asserted under the authority of Bivens + its progeny?

Applying the principles of our cases to claims of this kind, we hold that petitioner, as a former President of the United States, is entitled to absolute immunity from damages liability predicated on his acts in office. We consider this immunity a functionally mandated incident

Dick - This is well put

* We know of no attempt by the Congress to impose civil damage suit lightly on a President at any time in the history of our country. Any such attempt would present a serious Constitutional question that we have not had occasion to consider in this case

Dick - I'd like at least to say something like this

of the President's unique position,[25] rooted in the doctrine of the separation of powers and justified by considerations of public policy.

V

A

In arguing that the President is entitled only to qualified immunity,[26] the respondent relies on cases in which we have granted immunity of this scope to governors and cabinet officers.[27] We find these cases to be inapposite. Article II of the Constitution provides that

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[25]Cf. J. Story, Commentaries on the Constitution of the United States, § 1563, at 418-419 (1833 ed.):

> "There are ... incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions, which are confided to it. Among these, must necessarily be included the power to perform them .... The president cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability."

[26]Under the "good faith" standard, an official will be held immune from damages liability unless "he knew or reasonably should have know that the action he took within his sphere of official responsibility" was unconstitutional or "he took the action with malicious intention to cause a deprivation of constitutional rights or other injury...." Wood v. Strickland, 420 U.S. 308, 322 (1975).

[27]E.g., Butz v. Economou, 438 U.S. 478 (1978); Scheuer v. Rhodes, 416 U.S. 232 (1974).

"The executive Power shall be vested in a President of the United States...." This grant of authority establishes the President as the chief constitutional officer of the Executive branch.[28] The President's unique status distinguishes him from other executive officials. Further, the President's supervisory and policy responsibilities encompass areas of utmost discretionary authority. These include the administration of justice--it is the President who is charged constitutionally to "take care that the laws be faithfully executed";[29] the

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[28]Noting that the "Speech and Debate Clause" provides a textual basis for congressional immunity, respondent argues that the Framers must be assumed to have rejected any the propriety of Executive immunity. Petitioner, on the other hand, offers historical arguments that the Framers affirmatively assumed presidential immunity to have been established by the adoption of the constitutional scheme. Although we need not embrace petitioner's argument in order to decide this case, we do reject respondent's ~~suggestion~~ that the constitutional text ~~somehow~~ prohibits a judicial recognition of absolute immunity ~~as least in the absence of a clear congressional signal to the contrary--in order to facilitate operation of effective government under the constitutional order.~~ There are two difficulties with respondent's argument. First, a specific textual basis has not been considered a prerequisite to the recognition of immunity. No provision expressly confers judicial immunity. Yet the immunity of judges is well settled. See, e.g., Bradley v. Fisher, 13 Wall 335 (1872); Stump v. Sparkman, supra. Second, this Court has established that immunity may be extended to certain officials of the Executive Branch. Butz v. Economou, supra, 438 U.S., at 511-512; see Imbler v. Pachtman, supra, (extending immunity to prosecutorial officials within the Executive branch).

[29]U.S. Const., Art II, § 3.

conduct of foreign affairs--a realm in which the Court has recognized that "It would be intolerable that courts, without relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret";[30] and management of the personnel of the Executive branch--a task for which "imperative reasons requir[e] an unrestricted power [in the President] to remove the most important of his subordinates in their most important duties."[31]

B

In deference to the President's singular constitutional mandate, the courts traditionally have exercised their jurisdiction over him with ~~great~~ caution and marked restraint. This Court has never held that courts may compel the President to perform even ministerial functions.[32] By contrast, injunctions compelling action

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[30] Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 111 (1948).

[31] Myers v. United States, 272 U.S. 52, 134-135 (1926).

[32] Although this issue has not been faced squarely by the Court, there have been strong statements in previous opinions asserting the immunity of the President from judicial orders. In Mississippi v. Johnson, 71 U.S. 475, 501 (1866), the Court stated: "we are fully satisfied

Footnote continued on next page.

by other officials long have been upheld.[33] A similar 440

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that this court has no jurisidiction of a bill to enjoin the President in the performance of his official duties; and that no such bill ought to be received by us." And in Kendall v. United States, 12 Pet. 524, 610 (1838), it is stated: "The executive power is vested in a President; and as far as his powers are derived from the consitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeaching power."). But see National Treasury Employees Union v. Nixon, 492 F.2d 587, 616 (1974) (concluding that a court possesses the "authority to mandamus the President to perform the ministerial duty" of effectuating a pay raise).

Even in United States v. Nixon, the court held that Presidential conversations and correspondence enjoy a "presumptive privilege" that is "inextricably rooted in the separation of powers." 418 U.S., at 708. We suggested that this privilege may be more absolute when matters of diplomacy or national security are involved. Id., at 706, 710-711.

Strong historical considerations support the traditional judicial reluctance to enjoin action by the President. At the time of the first Congress, Vice President John Adams and Oliver Ellsworth, Senator from Connecticut, were reported as stating that "the President, personally, was not subject to any process whatever; could have no action, whatever, brought against him; and above the power of all judge, justices, etc." since otherwise a court could "stop the whole machinery of government." 2 W. Maclay, Sketches of Debate in the First Senate of the United States 152 (Harris ed. 1880). Justice Story offered a similar argument somewhat later See 3 J. Story, Commentaries on the Constitution of the United Staets § 1563, at 418-519 (1st ed. 1833).

It also is clear that Thomas Jefferson believed the President not to be subject to judicial process. When Chief Justice Marshall held in United States v. Burr, 25 Fed. Cas. 30 (1807), that a subpoena duces tecum can be issued to a President, Jefferson protested srongly, and stated his broader view of the proper relationship between the Judiciary and the President:

"The leading principle of our Constitution is the independence of the Legislature, executive and judiciary of each other, and none are more jealous of this than the judiciary. But would the executive be independent of the

distinction is reflected in the approach of this Court to cases in which various officials have claimed an evidentiary privilege. The courts generally have looked to the common law to determine the scope of an official's privilege.[34] In considering ~~assaying~~ claims by the President, 445 however, we have recognized that presidential immunity is "rooted in the separation of powers under the Constitution." United States v. Nixon, 418 U.S. 683, 708 (1974).

The separation of powers doctrine of course does not bar every 450 exercise of jurisdiction over the President of the United States. See, e.g., United States v. Nixon, supra; United States v. Burr, 25 Fed. Cases 191, 196 (1807); cf. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579

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than to the executive." 10 The Works of Thomas Jefferson 404n. (P. Ford ed. 1905) (quoting a letter from President Jefferson to a prosecutor at the Burr trial) (emphasis in the original). See also 5 D. Malone, Jefferson and His Time: Jefferson the President 320-325 (1974).

[33]See Youngstwon Sheet & Tile Co. v. Sawyer, 343 U.S. 579 (1952) (injunction directed to Secretary of Commerce); Kendall v. United States, supra (mandamus to enforce ministerial duty of the Postmaster General).

[34]See United States v. Reynolds, 345 U.S. 1, 6-7 (1952) (Secretary of Defense); Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 323-324 (D.D.C. 1966), aff'd 384 F.2d 979 (CADC), cert denied, 389 U.S. 952 (1967) (Department of Justice officials).

(1952).[35] But it does mandate that a court, before exercising jurisdiction, must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the executive branch.[36] In cases in which judicial action is needed to serve broad public interests--as when the court acts, not in derogation of the separation of powers, but to maintain their proper balance, cf. Youngstown Sheet & Tube Co. v. Sawyer, supra--the exercise of jurisdiction has been held warranted. In the case of a merely private suit for damages based on a President's official acts,[37] we hold

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[35]Although the President was not a party, the Court enjoined the Secretary of Commerce from executing a direct presidential order. See 343 U.S., at 583.

[36]See Nixon v. General Services Administration, 433 U.S. 425, 433 (1977); United States v. Nixon, 418 U.S. 683 (1974).

[37]Even in the case of officials possessing absolute immunity, this Court sometimes has held that this immunity extends only to acts in performance of particular functions. See Butz v. Economou, supra, 438 U.S., at 508-517; cf. Imbler v. Pachtman, supra, 424 U.S., at 430-431. In the case of the President, however, powerful prudential reasons counsel our rejection of this selective approach.

Under the Constitution and laws of the United States the President has discretionary responsibilities in a ~~unique variety of sensitive areas~~. His constitutional mandate ~~runs to~~ civil and criminal litigation policy, national security, and organization and assignment of Executive personnel. In many cases it would be difficult to determine which presidential "function" encompassed a particular action. Thus, in order to administer functional distinctions among Presidential actions, judges frequently would need to inquire into the purpose for which acts were taken. Inquiries of this kind would be

Footnote continued on next page.

that it is not.[38]

nearly as intrusive as inquiries into the possible malice of the President under a standard of qualified immunity.

In determining the proper scope of an absolute privilege, this Court repeatedly has refused to draw lines finer than concerns of policy would support. See, e.g., Spalding v. Vilas, supra, 161 U.S., at 498 (privilege extends to all matters "committed by law to [an official's] supervision or control"); Barr v. Matteo, supra, 360 U.S., at 575 (fact "that the action taken here was within the outer perimeter of petitioner's line of duty is enough to render the privilege applicable...."); Stump v. Sparkman, supra, 435 U.S., at 363 & n. 12 (judicial privilege applies even to acts occurring outside "the normal attributes of a judicial proceeding"). In view of the special nature of the President's constitutional office, we think it appropriate to extend to him absolute immunity from damage actions based on acts within the "outer perimeter" of his area of official responsibility.

In this case respondent argues that petitioner Nixon would have acted outside the perimeter of his duties by ordering the discharge of respondent Fitzgerald, who was lawfully entitled to retain his job in the absence of "such cause as will promote the efficiency of the service." Brief for Respondent, at 39, citing 5 U.S.C. § 7512(a). Because Congress has granted this legislative protection, petitioner argues, no federal official could, within his authority, cause Fitzgerald to be dismissed without satisfying this standard of proof. This construction of the President's authority would subject him to trial on every allegation of tortious illegality and thereby deprive absolute immunity of its intended effect. It clearly is within the President's authority to "prescribe" the manner in which the Secretary will "conduct the business" of the Air Force. 10 U.S.C. § 8012(b). Because this grant includes the authority to prescribe reorganizations and reductions in force, petitioner's alleged wrongful acts lay well within the outer perimeter of his authority.

[38] It never has been denied that absolute immunity may impose a ~~lamentable~~ serious cost on the individuals whose rights have been violated. As Judge Learned Hand wrote in Gregoire v. Biddle, 177 F.2d 579, 581 (CA2 1949), cert denied, 339 U.S. 949 (1950):

> "It does indeed go without saying that an oficial, who is in fact guilty of using his powers to vent his spleen upon others, or for any personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for ... [denying recovery] is that it is impossible to know

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The threat of suits for damages could deflect a President's energies from his duties as Chief Executive and Commander in Chief of the Armed Forces of the United States. In view of the special prominence of his office and the effect of his actions on countless people, the President would be an easily identifiable and inviting target of damage actions by every disgruntled citizen.[39] The threat of liability might, for example, instill an unwanted hesitancy to remove ineffecient or even disloyal personnel, to enforce the laws against groups or individuals prone to litigation, or to pursue efficiencies disadvantageous to those benefited by prevailing policies.[39] Exposure of the President to

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whether the claim is well founded until the case has been tried, and to submit all officials, the innocent as well as the guilty, to the burden of trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute .... As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative."

In weighing the balance of advantages, this Court has found that there is a lesser public interest in actions for civil damages than, for example, in criminal prosecutions, United States v. Gillock, 100 S. Ct. 1185, 1193 (1980); see United States v. Nixon, supra, 418 U.S., at 711-712 and n. 19 (basing holding on special importance of evidence in a criminal trial and distinguishing civil actions as raising different questions not presented for decision).

[39] The argument that frivolous lawsuits can be disposed of summarily has only limited force. Lawsuits involving a qualified-immunity standard generally require courts to inquire into the motives of the defendants, and

Footnote continued on next page.

take another look at pp 6-7 of last Terri's draft (typewritten copy) Some more of the language may fit into the text here pp 31, 32.

damages actions also could distort the process of decisionmaking at the highest levels of the executive branch. Anticipating lawsuits, the President and his advisers naturally would ~~feel~~ have an incentive to devote scarce energy, not to performance of their public duties, but to compilation of a record insulating the President against subsequent liability.

VI

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such matters are difficult to resolve short of prolonged discovery or trial. This case itself has been in the courts since 1974. As Judge Gesell stated in his concurring opinion in Halperin v. Kissinger, supra:

> "We should not close our eyes to the fact that with increasing frequency in this jurisdiction and throughout the country plaintiffs are filing suits seeking damage awards against high government officials in their personal capacities based on alleged constitutional torts. Each such suit almost invariably results in these officials and their colleagues being subjected to extensive discovery into traditionally protected areas.... Such discovery is wide-ranging, time-consuming, and not without considerable cost to the officials involved. It is not difficult for ingenious plaintiff's counsel to create a material issue of fact on some element of the immunity defense where subtle questions of constitutional law and a decision maker's mental processes are involved.... In short, if these standards are those to be followed in these cases, trial judges will almost automatically have to send

A rule of absolute immunity for the President will not leave the Nation without sufficient remedies for misconduct on the part of the chief executive.[40] There remains first the constitutional remedy of impeachment.[41] In addition, Presidents may be prosecuted criminally, at least after they leave office. Moreover, there are informal checks on Presidential misconduct that do not apply with equal force to other executive officials. The President is subjected to constant scrutiny by Congress and by the press. Their vigilance may serve to deter Presidential misconduct, as well as to make credible the threat of impeachment. Other incentives to avoid misconduct may include a desire to earn re-election, the need to maintain prestige as an element of presidential influence, and a President's traditional concern for his

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[40]The presence of alternative remedies has played an important role in our previous decisions in the area of official immunity. E.g., Imbler v. Pachtman, supra, at

historical stature.

The existence of alternative remedies and deterrents clearly establishes that absolute immunity will not place the President "above the law." For the President, as for judges and prosecutors, absolute immunity merely precludes a particular private remedy for alleged misconduct in order to advance compelling public ends.

VII

For the reasons stated in this opinion, the decision of the Court of Appeals is reversed and the case remanded for action consistent with this opinion. So ordered.

lfp/ss 05/14/82 Rider A, p. 1 (Nixon)

NIXON1 SALLY-POW

Note to Dick: In addition to adding "in his official capacity" in the third line of our opinion, consider a footnote keyed to the end of the first paragraph on page 1:

We consider only the scope of a President's immunity in a civil suit seeking to impose a damages liability for an official act claimed to have violated the statutory or constitutional rights of a person. We are not concerned, as one might infer from language in the dissenting opinion, with violation of criminal laws by a President or with tortuous conduct not within the scope of a President's authority.

The dissent argues that the "scope of immunity is determined by function, not office". Ante, at 19, et seq. The distinction between "function" and "office" can be relevant - indeed controlling in many situations. We long have recognized, however, that the distinction does not exist where certain officers act within the scope of their authority. For example, the "office" all that is required for a judicial officer to be protected by absolute immunity when he performs a judicial act. He is immune without regard to whether he "knows his conduct violates a statute or tramples on the constitutional rights of those who are injured." (see dissenting opinion, at 1). Writing for the Court in Stumpf v. Sparkman, 435 U.S. 349, 355, 356, Justice White quoted with approval the often cited language from Bradley v. Fisher, 13 Wall 335, 351 (1872) that judges "are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly". Similarly, the absolute

immunity of a prosecuting attorney is not forfeited even when he institutes a prosecution for political purposes, and the result is imprisonment of an innocent person. (Cite Imbler) Again, a member of Congress, who by virtue of his office introduces legislation for the purpose of destroying the reputation of a private citizen, retains absolute immunity. A President, vested by the Constitution with "the executive power" of the United States, likewise should be absolutely immune from civil danage liability for executive action taken within the scope of his authority.

This alternative adopts almost without revision the analytical sections of last years Draft VI, Version I.

These need a second look { 4 6-7

In a consistent line of decisions, this Court has recognized that when governmental officials are sued for damages arising from alleged violations of constitutional rights, they are entitled to some form of immunity in order to shield them from undue interference with their duties and excessive exposure to liability. In Tenney v. Brandhove, 341 U.S. 367 (1951), the Court held that the passage of 42 U.S.C. § 1983 had not abrogated the common- 1
law privilege accorded to state legislators for acts within their legislative roles. The decision in Pierson v. Ray, 386 U.S. 547 (1967), involving a constitutional suit against a state judge, recognized the continued validity of the absolute immunity accorded to judges at 1
common law for acts within the judicial role. Pierson also held that police officers possess a qualified immunity protecting them from suits when their official acts are performed in good faith. Id., at 556. This qualified immunity was extended to state executive 2
officals in Scheuer v. Rhodes, 416 U.S. 232 (1974), where

we held that the immunity varied in scope, "the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based," id., at 237.

The functional approach adopted in Scheuer led to differing results when the Court held that school-board officials possess only qualified immunity, Wood v. Strickland, 420 U.S. 308 (1975), but state prosecutors possess absolute immunity with respect to the initiation and pursuit of prosecutions, Imbler v. Pachtman, 424 U.S. 409 (1976). See also O'Connor v. Donaldson, 422 U.S. 563 (1975) (qualified immunity accorded to state hospital superintendent); Procunier v. Navarette, 434 U.S. 555 (1978) (prison administrators accorded qualified immunity); Supreme Court of Virginia v. Consumers Union, ___ U.S. ___ (1980) (in suit for declaratory relief involving rules governing lawyers, state supreme court held immune from suit for legislative actions, but not immune from challenges to enforcement activities); Dennis v. Sparks, ___ U.S. ___ (1980) (no immunity accorded to

private parties who conspire with an immune judge to deprive others of civil rights).

This approach was reviewed in detail in Butz v. Economou, 438 U.S. 478 (1978), where we considered for the first time the kind of immunity possessed by federal executive officials who, like petitioners here, are sued for constitutional violations.[1] In Butz, the Court rejected an argument, based on several decisions involving federal officials charged with common-law torts,[2] that all high federal officials should be accorded absolute immunity from constitutional damage suits. In so holding, we concluded that such a blanket grant of absolute immunity would be anomalous in light of the qualified-immunity standard applied to state officials, 438 U.S., at 504, and "would seriously erode the protection provided by basic constitutional guarantees." id., at 505. Nevertheless, we noted that under our decisions some

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[1]Such suits are based, not on § 1983, but on general federal-question jurisdiction and the remedial powers of the federal courts. See Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971).

[2]Barr v. Matteo, 360 U.S. 564 (1959); Spalding v. Vilas, 161 U.S. 483 (1896).

officials, notably judges and prosecutors, have "special functions requir[ing] a full exemption from liability." Id., at 508. We therefore recognized that some federal officials may show that "public policy requires an exemption from liability." Id., at 508.

This case now presents the claim that the President of the United States falls into the category of federal officials who should be accorded absolute immunity from damage suits based on constitutional violations.

IV

Our decision in Scheuer, supra, discussing the qualified immunity possessed by state executive officials, recognized that the extent of protection afforded an official may vary with the responsibilities and discretion of his office. 416 U.S., at 247. We explained that the "range of decisions and choices" required of a high executive official is "virtually infinite," yet such an official often must act quickly lest "action deferred will be futile or constitute virtual abdication of office." Id., at 246. In addition, these officials must "rely on traditional sources for the factual information on which

they decide and act," ibid., and, in times of emergency, may make decisions in an "atmosphere of confusion, ambiguity, and swiftly moving events," id., at 247. "In short," we concluded, "since the options which a chief executive and his principal subordinates must consider are far broader and far more subtle than those made by officials with less responsibility, the range of discretion must be comparably broad." Ibid. In the Butz decision applying qualified immunity to high federal executive officials, we noted that, as compared with the opportunities for abuses by lower federal employees, the "greater power of such officials affords a greater potential for a regime of lawless conduct." 438 U.S., at 506. We did not, however, reject Scheuer's perception that such higher officials will receive greater protection under a good-faith standard because of their broader range of responsibilities and choices. Indeed, the Butz opinion applied the "governing principles," id., at 503, of Scheuer to federal officials, and recognized that the special functions of some officials require absolute immunity,, id., at 508-517.[3]

Footnote(s) 3 will appear on following pages.

When applied to the office of President of the United States, these principles require due consideration of the characteristics of that unique office. Our prior decisions require a protective shield around presidential decision-making that is commensurate with the unequalled breadth and gravity of the President's duties. We cannot ignore the fact that he is the official required by the Constitution to play a major role in nearly all aspects of the governance of the Nation, and is called upon daily to make critical decisions, some of which implicate the very survival of the Nation. In performing these functions, the President does not work solely thorugh formal procedural avenues, such as the lawmaking process. instead, he is entrusted with responsibility for the

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[3]Four basic rationales support immunity for public officials. First, the prospect of damages liability may render officials unduly cautious in the discharge of their public responsibilities. See Gregoire v. Biddle, 177 F. 2d 579, 581 (CA2 1949), cert. denied, 339 U.S. 949 (1950). Second, competent and responsible individuals may be deterred from entering public service in the first place. Third, public servants may be distracted from their duties by the need to defend frequent lawsuits. Finally, as this case illustrates, there is a danger of unfairness when officials face personal liability for decisions made in areas of legal uncertainty that are reviewed by courts years later, under evolving legal standards. See generally Freed, Executive Official Immunity for Constitutional Violations: An Analysis and a Critique, 72 Nw. L. Rev. 526, 529-530 (1977).

various informal aspects of governing - with discretion to act on his own when the national interest requires a result that cannot be legislated or adjudicated. In short, the President is responsible for a vast array of "executive" functions which he cannot avoid but which 120 expose him to countless potential damage suits. Moreover, as the natural focal point for so many of the perceived grievances against the Federal Government, he is unlikely to be overlooked as a potential defendant.[4]

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[4]The likelihood that Presidents will face large numbers of constitutional damage suits creates a risk that Presidential decisionmaking will be interfered with unduly. Presidents may be daunted by their exposure to huge damage recoveries, including some that are disproportionate responses to perceived grievances. Courts and juries, after all, may tend to judge emergency executive decisions harshly in the clear light of hindsight. Moreover, leaving aside the risk of substantial judgments, a sitting President may be diverted from the pressing duties of his office by the requirements of defending numerous lawsuits - including the answering of interrogatories and giving of testimony. The argument that frivolous lawsuits can be handled summarily has only limited force. Lawsuits involving a qualified-immunity standard generally require courts to inquire into the motives of the defendants, and such matters are difficult to resolve short of prolonged discovery or trial. This case itself has been in the courts since 1973. As Judge Gesell stated in his concurring opinion below:

> "We should not close our eyes to the fact that with increasing frequency in this jurisdiction and throughout the country plaintiffs are filing suits seeking damage awards against high government officials in their personal capacities based on alleged constitutional torts. Each such suit almost invariably results in these officials and their colleagues being subjected to extensive discovery into traditionally protected areas.... Such discovery is wide-ranging, time-consuming, and

Footnote continued on next page.

V

The unique nature of the presidential office, as established by our Constitution, requires a level of immunity higher than that of any other executive official.[5] The President is the head of the Executive

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not without considerable cost to the officials involved. It is not difficult for ingenious plaintiff's counsel to create a material issue of fact on some element of the immunity defense where subtle questions of constitutional law and a decision maker's mental processes are involved.... In short, if these standards are those to be followed in these cases, trial judges will almost automatically have to send such cases to full trials on the merits." ___ U.S. App. D.C., at ___, 606 F.2d, at 1214.

These dangers are significant even though there is no historical record of numerous suits against the President, since a right to sue federal officials for damages for constitutional violations was not even recognized until Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971).

[5]There are prudential reasons as well for rejecting a selective approach differentiating among various presidential functions. In many cases, it would be difficult to determine which area encompassed a particular action. In this sense, a President is quite different from a prosecutor, whose functions fall relatively easily into categories - investigation, initiation of a prosecution, presentation of a case, etc. Any similar line-drawing in the area of Presidential action would necessarily require an inquiry into the purpose of an action. Such an inquiry by a court would be nearly as intrusive as an inquiry into the possible malice of the President under a qualified-immunity standard. Indeed, it has been argued that even prosecutors should be given absolute immunity regardless of the particular function involved, because of the intrusiveness of an inquiry into intent. See Note, Delimiting the Scope of Prosecutorial Immunity from § 1983 Damage Suits, 52 N.Y.U.L. Rev. 173, 200 (1977).

For similar reasons, I would not adopt a rule granting absolute immunity only where the President has acted in order to furtehr the national interest - i.e., except where he has acted to further purely personal interests. Such a rule also would require an inquiry into motive. Here, for example, it might require a remand for a determination whether the wiretap remained a matter of national security throughout its duration.

Branch in whom are invested all of the powers specified by Article II of the Constitution.[6] As his status, duties, and responsibilities therefore are qualitatively different from other officials, it is proper to accord him absolute immunity from damage suit liability for all of his official acts.

Such a rule is mandated by our constitutional structure and is faithful to the assumptions that have prevailed since the founding of the Nation. The Constitution itself is silent on this question, while it exempts Members of Congress explicitly under the Speech or Debate Clause. U.S. Const. Art. I, §6. But there are historical reasons for the concern that prompted the adoption of Art. I, §6. The Founding Fathers were aware of the long struggle for parliamentary privilege in England. See e.g., United States v. Johnson, 383 U.S. 169, 177-182 (1966). A similar reason for concern did not exist with respect to the chief of state. Although the structure of the Constitution was carefully designed by

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[6] U.S. Const., Art. II, § 1 ("The executive Power shall be vested in a President of the United States.").

the checks and balances of the separation of powers to prevent an imperial President, the importance of the role of the chief executive officer of the Nation was clearly recognized and preserved. Indeed, the Founders gave the President, as an individual official, a separate and equal footing with Congress and this Court as corporate bodies. The omission of an explicit exemption of the President from personal damages suits may be explained by a general understanding at the time that no explicit exemption was necessry.

One reflection of the prevailing historical assumption is the general reluctance on the part of the courts to exercise their power against the President personally. Although the President may, in some limited circumstances, be compelled by a court to produce materials subpoenaed for use in a criminal prosecution, United States v. Nixon, supra, this Court has never held that courts may compel the President himself to perform even ministerial executive functions,[7] and statements from

[7]Although this issue has not been faced squarely by the Court, there have been strong statements in previous

Footnote continued on next page.

the early days of the Republic support such a limitation on judicial power.[8] This reluctance to enjoin

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opinions asserting the immunity of the President from judicial orders. In Mississippi v. Johnson, 71 U.S. 475, 501 (1866), the Court stated: "we are fully satisfied that this court has no jurisidiction of a bill to enjoin the President in the performance of his official duties; and that no such bill ought to be received by us." And in Kendall v. United States, 12 Pet. 524, 610 (1838), it is stated: "The executive power is vested in a President; and as far as his powers are derived from the consitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeaching power."). But see National Treasury Employees Union v. Nixon, ___ U.S. App. D.C. ___, ___, 492 F.2d 587, 616 (1974) (concluding that a court possesses the "authority to mandamus the President to perform the ministerial duty" of effectuating a pay raise).

Even in United States v. Nixon, the court held that Presidential conversations and correspondence enjoy a "presumptive privilege" that is "inextricably rooted in the separation of powers." 418 U.S., at 708. We suggested that this privilege may be more absolute when matters of diplomacy or national security are involved. Id., at 706, 710-711.

[8]At the time of the first Congress, Vice President John Adams and Oliver Ellsworth, Senator from Connecticut, were reported as stating that "the President, personally, was not subject to any process whatever; could have no action, whatever, brought against him; and above the power of all judge, justices, etc." since otherwise a court could "stop the whole machinery of government." 2 W. Maclay, Sketches of Debate in the First Senate of the United States 152 (Harris ed. 1880). Justice Story offered a similar argument somewhat later See 3 J. Story, Commentaries on the Constitution of the United Staets § 1563, at 418-519 (1st ed. 1833).

Few historical facts are clearer than Thomas Jefferson's view that the President was not subject to judicial process. When Chief Justice Marshall held in United States v. Burr, 25 Fed. Cas. 30 (1807), that a subpoena duces tecum can be issued to a President, Jefferson protested srongly, and stated his broader view of the proper relationship between the Judiciary and the President:

"The leading principle of our Constitution is the independence of the Legislature, executive and judiciary of each other, and none are more jealous of this than the judiciary. But would the executive be independent of the judiciary, if he were subject to the commands of the latter, & to imprisonment for disobedience; if the several courts could bandy him from pillar to post, keep him constantly trudging from north to south & east to west, and withdraw him entirely from his constitutional duties?

Footnote continued on next page.

Presidential action contrasts markedly with the ready acceptance of court orders compelling action on the part of other executive officials.[9] A similar distinction between Presidents and their subordinates has been drawn by some commentators with respect to the possibility of criminal prosecutions while in office.[10]

The threat of damages suits, along with the requirements of litigating such suits while in office, could have a significant effect on a President's performance in office. This fact is one of the reasons for providing such a remedy, as well as one of the major

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The intention of the Constitution, that each branch should be independent of the others, is further manifested by the means it has furnished to each, to protect itself from enterprises of force attempted on them by the others, and to none has it given more effectual or diversified means than to the executive." 10 The Works of Thomas Jefferson 404n. (P. Ford ed. 1905) (quoting a letter from President Jefferson to a prosecutor at the Burr trial) (emphasis in the original). See also 5 D. Malone, Jefferson and His Time: Jefferson the President 320-325 (1974).

The statements quoted here concerning a President's amenability to process apply only to sitting Presidents, and may not accord with present views of jujdicial power, but they do indicate the historical recognition given to the President's special constitutional status.

[9]See Youngstwon Sheet & Tile Co. v. Sawyer, 343 U.S. 579 (1952) (injunction directed to Secretary of Commerce)' Kendall v. United States, supra (mandamus to enforce ministerial duty of the Postmaster General).

[10]See Bickel, The Constitutional Tangle, The New Republic, October 6, 1973, at 14; P. Kurland, Watergate and The Constitution 135 (1978).

reasons for the creation of official immunities. In weighing the advantages and disadvantages of a damage remedy against the President himself, the unique constitutional status of this particular official, as recognized throughout our history becomes the determinative factor. It simply is inconsistent with our system to leave Presidents exposed to open-ended litigation by every disgruntled citizen and to potentially devastating liability in damages, imposed by order of a separate branch of government.

A rule of absolute immunity for the President will not leave the Nation without sufficient remedies for misconduct on the part of the chief executive.[11] There remains, first of all, the remedy of impeachment.[12] In additiion, Presidents may be prosecuted criminally, at

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[11]The presence of alternative remedies has played an important role in our previous decisions in teh area of official immunity. E.g., Imbler v. Pachtman, supra, at 428-429 ("We emphasize that the immunity of prosecutors from liability in suits under § 1983 does not leave the public powerless to deter misconduct or to punish tha which occurs.")

[12]The same remedy plays a central role with respect to the misconduct of federal judges, who also possess absolute immunity. See Kaufman, Chilling Judicial Independence, 88 Yale L.J. 681, 690-706 (1979)/ Congressman may be removed from office by a vote of their colleagues. U.S. Const., Art. I, § 5, cl. 2.

least after they leave office. The existence of these alternative remedies is not alone, determinative because they also apply to numerous executive officials who are accorded only qualified immunity under our decision in Butz v. Economou, supra. Yet the balance of competing considerations is different with respect to the President than it is for any other executive official. In addition, there are various less formal checks on Presidential misconduct that do not apply with equal force to other executive officials. The President is subjected constantly to intense public and congressional scrutiny. Such scrutiny may serve to deter Presidential misconduct, as well as to make the sanction of impeachment a real threat. The President has other incentives to avoid misconduct that result from his possible desire to seek re-election, his need to maintain his prestige and influence over other governmental officials, and his traditional concern for his place in history. All of these factors make clear that absolute Presidential immunity will not place the President "above the law."[13]

Footnote(s) 13 will appear on following pages.

Instead, such a rule merely rejects a particular remedy of misconduct in order to further the broader public good.[14]

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[13]As Judge Learned Hand wrote in Gregoire v. Biddle, 177 F.2d 579 581 (CA 2 1949), cert denied, 339 U.S. 949 (1950), "to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.... In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation."

[14]The idea that some governmental officials should be shielded absolutely from liability in damages is hardly new or unusual. Under our decisions, absolute immunity from suit extends to judges, Pierson v. Ray, supra, prosecutors Imbler v. Pachtman, supra, and state legislators, Tenney v. Brandhove, supra. In addition, such immunity covers a large number of administrative officials under our decision in Butz v. Economou, supra. In Butz, we held that federal agency "officials who are responsible for the decision to initiate or continue [an administrative] proceeding subject to agency adjudication are entitled to absolute immunity from damages liability for their parts in that decision." 438 U.S., at 516. Butz also accorded absolute immunity to the lawyers who prosecute and the administrative law judges who hear them. Id., at 514-517. There are at least 30 federal agencies and departments with authority to initiate such proceedings. Although the number of immunized officials and lawyers is unknown, there were 1,146 law judges serving these agencies in 1980, Administrative Conference of the United States, Federal Administrative Law Judge Hearings: Statistical Report for 1976-1978, p. 21 (1980). Moreover, in 1978, 216843 new agency proceedings were begun, id, at 33, although these include cases that were not initiated by the government and thus cannot be viewed as "prosecutorial."

In granting this immunity to numerous administrative officials, we reasoned that they performed functions analgous to those of prosecutors and judges. But unlike judges, publicly appointed or elected prosecutors, and legislators, many of these officials are unkown and often may be difficult to identify. Many of the informal constraints applicable to highly visible judges, prosecutors and legislators are far less likely to apply to these individuals. Yet, it is argued here that the President of the United States should have less immunity.

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SUPREME COURT OF THE UNITED STATES

No. 79-1738

RICHARD NIXON, PETITIONER, *v.*
A. ERNEST FITZGERALD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[March ——, 1982]

JUSTICE POWELL delivered the opinion of the Court.

The plaintiff in this lawsuit seeks relief in civil damages from a former President of the United States. The claim rests on actions allegedly taken during the former President's tenure in office. The issue before us is the scope of the immunity possessed by the President of the United States.

I

In January 1970 the respondent A. Ernest Fitzgerald lost his job as a management analyst with the Department of the Air Force. Fitzgerald's dismissal occurred in the context of a departmental reorganization and reduction in force, in which his job was eliminated. In announcing the reorganization, the Air Force characterized the action as taken to promote economy and efficiency in the armed forces.

Respondent's discharge attracted unusual attention in Congress and in the press. Fitzgerald had attained national prominence approximately one year earlier, during the waning months of the presidency of Lyndon B. Johnson. On November 13, 1968, Fitzgerald appeared before the Subcommittee on Economy in Government of the Joint Economic Committee of the United States Congress. To the apparent embarrassment of his superiors in the Department of Defense, Fitzgerald testified that cost-overruns on the C-5A

transport plane could approximate $2 billion.[1] He also revealed that unexpected technical difficulties had arisen during the development of the aircraft.

Concerned that Fitzgerald might have suffered retaliation for his congressional testimony, the Subcommittee on Economy in Government convened public hearings on Fitzgerald's dismissal.[2] The press reported those hearings prominently, as it had the earlier announcement that his job was being eliminated by the Department of Defense. At a news conference on December 8, 1969, President Richard Nixon was queried about Fitzgerald's impending separation from government service.[3] The President responded by promising to

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[1] See *Economics of Military Procurement: Hearings Before the Subcommittee on Economy in Government of the Joint Economic Comm.*, 90th Cong., 2d Sess., Part I, at 199–201 (1968–1969). It is not disputed that officials in the Department of Defense were both embarrassed and angered by Fitzgerald's testimony. Within less than two months of respondent's congressional appearance, staff had prepared a memorandum for the outgoing Secretary of the Air Force, Harold Brown, listing three ways in which Fitzgerald might be removed from his position. See Joint Appendix (JA), at 209–211 (Memorandum of John Lang to Harold Brown, Jan. 6, 1969). Among these was a "reduction in force"—the means by which Fitzgerald ultimately was removed by Brown's successor in office under the new Nixon administration. The reduction in force was announced publicly on November 4, 1969, and Fitzgerald accordingly was separated from the Air Force upon the elimination of his job on January 5, 1970.

[2] See *The Dismissal of A. Ernest Fitzgerald by the Department of Defense: Hearings Before the Subcomm. on Economy in Government of the Joint Economic Comm.*, 91st Cong., 1st Sess. (1969). Some 60 Members of Congress also signed a letter to the President protesting the "firing of this dedicated public servant" as a "punitive action." *Ibid.*, at 115–116, JA, at 177–179.

[3] A briefing memorandum on the Fitzgerald matter had been prepared by White House staff in anticipation of a possible inquiry at the forthcoming press conference. Authored by aide Patrick Buchanan, it advanced the view that the Air Force was "firing . . . a good public servant." JA, at 269 (Memorandum of Patrick Buchanan to Richard Nixon, December 5, 1969). The memorandum suggested that the President order Fitzgerald's retention by the Defense Department.

look into the matter.[4] Shortly after the news conference the petitioner asked White House Chief of Staff H.R. Haldeman to arrange for Fitzgerald's assignment to another job within the Administration.[5] It also appears that the President suggested to Budget Director Robert Mayo that Fitzgerald might be offered a position in the Bureau of the Budget.[6]

Fitzgerald's proposed reassignment encountered resistance within the Administration.[7] In an internal memorandum of January 20, 1970, White House aide Alexander Butterfield reported to Haldeman that "Fitzgerald is no doubt a top-notch cost expert, but he must be given very low marks in loyalty; and after all, loyalty is the name of the game."[8] Butterfield therefore recommended that "We should let him bleed, for a while at least."[9] There is no evi-

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[4] JA, at 228.

[5] See JA, at 109–112 (Deposition of H.R. Haldeman); JA, at 137–141 (Deposition of petitioner Richard Nixon). Haldeman's deposed testimony was based on his handwritten notes of December 12, 1969. JA, at 275.

[6] See JA, at 125 (Deposition of Robert Mayo); JA, at 141 (Deposition of Richard Nixon).

[7] Both Mayo and his deputy, James Schlesinger, appear to have resisted at least partly due to a suspicion that Fitzgerald lacked institutional loyalty to Executive policies and that he spoke too freely in communications with friends on Capitol Hill. Both also stated that high level positions were presently unavailable within the Bureau of the Budget. See JA, at 126 (Deposition of Robert Mayo); JA, at 146–147 (Deposition of James Schlesinger).

[8] Quoted in *Decision on the Appeal of A. Ernest Fitzgerald* (*CSC Decision*), JA, at 60, 84 (September 18, 1973).

[9] *Id.*, at 85. The memorandum added that "We owe 'first choice on Fitzgerald' to [Senator] Proxmire and others who tried so hard to make him a hero [for exposing the cost overruns]." Suspicion of Fitzgerald's assumed loyalty toward Senator Proxmire was widely shared in the White House and in the Defense Department. According to the *CSC Decision*, *supra*, JA, at 83:

"While Mr. Fitzgerald has denied that he was 'Senator Proxmire's boy in the Air Force,' and he may honestly believe it, we find this statement difficult to accept. It is evident that the top officials in the Air Force, without

dence of White House efforts to reemploy Fitzgerald subsequent to the Butterfield memorandum.

Absent any offer of alternative federal employment, Fitzgerald complained to the Civil Service Commission. In a letter of January 20, 1970, he alleged that his separation represented unlawful retaliation for his truthful testimony before a congressional committee.[10] The Commission convened a closed hearing on Fitzgerald's allegations on May 4, 1971. Fitzgerald, however, preferred to present his grievances in public. After he had brought suit and won an injunction, *Fitzgerald* v. *Hampton*, 467 F. 2d 755 (1972), public hearings commenced on January 26, 1973. The hearings again generated publicity, much of it devoted to the testimony of Air Force Secretary Robert Seamans. Although he denied that Fitzgerald had lost his position in retaliation for congressional testimony, Seamans testified that he had received "some advice" from the White House before Fitzgerald's job was abolished.[11] But the Secretary declined to be more specific. He responded to several questions by invoking "executive privilege."[12]

At a news conference on January 31, 1973, the President was asked about Mr. Seamans' testimony. Mr. Nixon took the opportunity to assume personal responsibility for Fitzgerald's dismissal:

> "I was totally aware that Mr. Fitzgerald would be fired or discharged or asked to resign. I approved it and Mr. Seamans must have been talking to someone who had discussed the matter with me. No, this was

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specifically saying so, considered him to be just that. . . . We also note that upon leaving the Air Force Mr. Fitzgerald was employed as a consultant by the Proxmire Committee and that Senator Proxmire appeared at the Commission hearing as a character witness for [Fitzgerald]."

[10] See *CSC Decision*, JA. at 61.

[11] See *ibid.*, JA. at 83–84.

[12] See *id.*

> not a case of some person down the line deciding he should go. It was a decision that was submitted to me. I made it and I stick by it."[13]

A day later, however, the White House press office issued a retraction of the President's statement. According to a press spokesman, the President had confused Fitzgerald with another former executive employee. On behalf of the President, the spokesman asserted that Mr. Nixon had not had "put before him the decision regarding Mr. Fitzgerald."[14]

After hearing over 4,000 pages of testimony, the Chief Examiner for the Civil Service Commission issued his decision in the Fitzgerald case on September 18, 1973. *Decision on the Appeal of A. Ernest Fitzgerald*, JA, at 60. The Examiner held that Fitzgerald's dismissal had offended applicable civil service regulations. *Ibid.*, JA, at 86–87.[15] The Examiner based this conclusion on a finding that the departmental

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[13] JA, at 185. A few hours after the press conference, Mr. Nixon repeated privately to Presidential aide Charles Colson that he had ordered Fitzgerald's firing. JA., at 214–215 (recorded conversation of Jan. 31, 1973).

[14] JA, at 196 (transcription of statement of White House press secretary Ronald Ziegler, Feb. 1, 1973). In a conversation with aide John Ehrlichman, following his conversation with Charles Colson, see *supra* note 13, the President again had claimed responsibility for Fitzgerald's dismissal. When Ehrlichman corrected him on several details, however, the President concluded that he was "thinkin' of another case." JA, at 218 (recorded conversation of Jan. 31, 1973). See *id.*, at 220. It was after this conversation that the retraction was ordered.

[15] Fitzgerald's position in the Air Force was in the "excepted service" and therefore not covered by civil service rules and regulations for the competitive service. *Fitzgerald* v. *Hampton*, 467 F. 2d 755, 758 (CADC 1972); see *CSC Decision*, JA, at 63–64. In *Hampton*, however, the court held that Fitzgerald's employment nonetheless was under "legislative protection," since he was a "preference eligible" veteran entitled to various statutory protections under the Veterans Preference Act. See 467 F. 2d, at 758–768. Among these were the benefits of the reduction in force procedures established by civil service regulation. See 467 F. 2d, at 758.

reorganization in which Fitzgerald lost his job, though purportedly implemented as an economy measure, was in fact motivated by "reasons purely personal to" respondent. *Id.*, at 86. As this was an impermissible basis for a reduction in force,[16] the Examiner recommended Fitzgerald's reappointment to his old position or to a job of comparable authority.[17] The Examiner, however, explicitly distinguished this narrow conclusion from a suggested finding that Fitzgerald had suffered retaliation for his testimony to Congress. As found by the Commission, "the evidence in the record does not support [Fitzgerald's] allegation that his position was abolished and that he was separated . . . in retaliation for his having revealed the C–5A cost overrun in testimony before the Proxmire Committee on November 13, 1968." *Ibid.*, at 81.

Following the Commission's decision, Fitzgerald filed a suit for damages in the United States District Court. In it he raised essentially the same claims presented to the Civil Service Commission.[18] As defendants he named eight offi-

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[16] The Examiner found that Fitzgerald in fact was dismissed because of his superiors' dissatisfaction with his job performance. *CSC Decision*, JA, at 86–87. Their attitude was evidenced by "statements that he was not a 'team player' and 'not on the Air Force team.'" *Ibid.*, JA, at 83. Without deciding whether this would have been an adequate basis for an "adverse action" against Fitzgerald as an "inadequate or unsatisfactory employee," *ibid.*, at 86, the Examiner held that the Commission's adverse action procedures, current version codified at 5 CFR § 752, implicitly forbade the Air Force to employ a "reduction in force" as a means of dismissing respondent for reasons "personal to" him. JA, at 87.

[17] The Commission also ordered that Fitzgerald should receive back pay. *CSC Decision*, at 20–21, JA, at 87–88. Despite the Commission's order, respondent avers that he "has still not obtained reinstatement to a position equivalent to his former one," Brief for Respondent, at 11, n. 17, and that he therefore has brought an enforcement action in the District Court.

[18] The complaint alleged a continuing conspiracy to deprive him of his job, to deny him reemployment, and to besmirch his reputation. Fitzgerald alleged that the conspiracy had continued through the Commission hearings and remained in existence at the initiation of the lawsuit. See *Fitzgerald* v. *Seamans*, *supra*, 384 F. Supp., at 690–692.

cials of the Defense Department, White House aide Alexander Butterfield, and "one or More" unnamed "White House Aides" styled only as "John Does."

The District Court dismissed the action under the District of Columbia's three-year statute of limitations, *Fitzgerald* v. *Seamans*, 384 F. Supp. 688 (D.D.C. 1974), and the Court of Appeals affirmed as to all but one defendant, White House aide Alexander Butterfield, *Fitzgerald* v. *Seamans*, 553 F. 2d 220 (CADC 1977). The Court of Appeals reasoned that Fitzgerald had no reason to suspect White House involvement in his dimissal at least until 1973. In that year, reasonable grounds for suspicion had arisen, most notably through publication of the internal White House memorandum in which Butterfield had recommended that Fitzgerald at least should be made to "bleed for a while" before being offered another job in the Administration. 553 F. 2d, at 225, 229. Holding that concealment of illegal activity would toll the statute of limitations, the Court of Appeals remanded the action against Butterfield for further proceedings in the District Court.

Following the remand and extensive discovery thereafter, Fitzgerald filed a Second Amended Complaint in the District Court on July 5, 1978. It was in this amended complaint—more than eight years after he had complained of his discharge to the Civil Service Commission—that Fitzgerald first named the petitioner Nixon as a party defendant.[19] Also included as defendants were White House aide Bryce Harlow and other officials of the Nixon administration. Additional discovery ensued. By March 1980, only three defendants remained: the petitioner Richard Nixon and White House aides

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[19]The general allegations of the complaint remained essentially unchanged. In averring Nixon's participation in the alleged conspiracy against him, the complaint quoted petitioner's press conference statement that he was "totally aware" of and in fact "approved" Fitzgerald's dismissal. Second Amended Complaint, at 6.

Bryce Harlow and Alexander Butterfield. Denying a motion for summary judgment, the District Court ruled that the action must proceed to trial. Its order of March 26 held that Fitzgerald had stated triable causes of action under two federal statutes and the First Amendment to the Constitution.[20] The Court also ruled that petitioner was not entitled to claim absolute presidential immunity.

Petitioner took a collateral appeal of the immunity decision to the Court of Appeals for the District of Columbia Circuit. The Court of Appeals dismissed summarily. It apparently did so on the ground that its recent decision in *Halperin* v. *Kissinger*, 606 F. 2d 1192 (CADC 1979), aff'd by an equally

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[20] See Appendix to Petition for Certiorari, at 1a–2a. The District Court held that respondent was entitled to "infer" a cause of action under 5 U. S. C. § 7211 and 18 U. S. C. § 1505. Neither expressly confers a private right to sue for relief in damages. The first, 5 U. S. C. § 7211 (Supp. III 1979), provides generally that "The right of employees . . . to . . . furnish information to either House of Congress, or to a committee or a Member thereof, may not be interfered with or denied." The second, 18 U. S. C. § 1505, is a criminal statute making it a crime to obstruct congressional testimony. The correctness of the decision that a cause of action could be "implied" under these statutes is not currently before us. Neither is the question whether the courts, under the direct authority of the First Amendment, may recognize a private action against the President for relief in damages. Cf. *Carlson* v. *Green*, 446 U. S. 14, 19 (1980) (in direct constitutional actions against officials with "independent status in our constitutional scheme . . . judicially created remedies . . . might be inappropriate."); *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388, 396 (1971) (upholding judicial recognition of a nonstatutory damages remedy for Fourth Amendment violations in cases "involv[ing] no special factors counselling hesitation in the absence of affirmative action by Congress"). As explained *infra*, this case is here under the "collateral order" doctrine, for review of the District Court's denial of petitioner's motion to dismiss on the ground that he enjoyed absolute immunity from civil suit. The District Court also held that respondent had stated a claim under the common law of the District of Columbia, but respondent subsequently abandoned his common law cause of action. See Respondent's Supplemental Brief, at 2 (May 14, 1980).

divided vote, 452 U. S. 713 (1981), had rejected this claimed immunity defense.

As this Court has not ruled on the scope of immunity available to a President of the United States, we granted certiorari to decide this important issue. 452 U. S. 957 (1981).

II

Before addressing the merits of this case, we must consider two challenges to our jurisdiction. In his opposition to the petition for certiorari, respondent argued that this Court is without jurisdiction to review the non-final order in which the District Court rejected petitioner's claim to absolute immunity.[21] We also must consider an argument that an agreement between the parties has mooted the controversy.

A

Petitioner invokes the jurisdiction of this Court under 28 U. S. C. § 1254, a statute that invests us with authority to review "[c]ases in" the courts of appeals.[22] When the petitioner in this case sought review of an interlocutory order denying his claim to absolute immunity, the Court of Appeals dismissed petitioner's appeal for lack of jurisdiction. Emphasizing the "jurisdictional" basis for the Court of Appeals' decision, respondent argued that the District Court's order was not an appealable "case" properly "in" the Court of Appeals within the meaning of § 1254. We do not agree.

Under the "collateral order" doctrine of *Cohen* v. *Benefi-*

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[21] See Brief for Respondent in Opposition to the Petition for Certiorari, at 2. Although Fitzgerald has not continued to urge this argument, the challenge was jurisdictional, and we therefore address it.

[22] The statute provides in pertinent part:

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. . . .

28 U. S. C. § 1254.

cial Industrial Loan Corp., 337 U. S. 541 (1949), a small class of interlocutory orders are immediately appealable to the courts of appeals. As defined by *Cohen*, this class embraces orders that "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and [are] effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 468 (1978); see *Cohen*, *supra*, 337 U. S., at 546–547. As an additional requirement, *Cohen* established that a collateral appeal of an interlocutory order must "present[] a serious and unsettled question." 337 U. S., at 547. At least twice before this Court has held that orders denying claims of absolute immunity are appealable under the *Cohen* criteria. See *Helstoski* v. *Meanor*, 442 U. S. 500 (1979) (claim of immunity under the Speech and Debate Clause); *Abney* v. *United States*, 431 U. S. 651 (1977) (claim of immunity under Double Jeopardy Clause). In previous cases the Court of Appeals for the District of Columbia Circuit also has treated orders denying absolute immunity as appealable under *Cohen*. See *Briggs* v. *Goodwin*, 569 F. 2d 10, 58–60 (CADC 1977) (Wilkey, J., writing separately for the Court on the appealability issue); *McSurely* v. *McClellan*, 521 F. 2d 1024, 1032 (1975), aff'd in pertinent part en banc, 553 F. 2d 1277, 1283–1284 n. 18 (1976), cert dismissed *sub nom. McAdams* v. *McSurely*, 438 U. S. 189 (1978).

In "dismissing" the appeal in this case, the Court of Appeals appears to have reasoned that petitioner's appeal lay outside the *Cohen* doctrine because it raised no "serious and unsettled question" of law. This argument was pressed by the respondent, who asked the Court of Appeals to dismiss on the basis of that court's "controlling" decision in *Halperin* v. *Kissinger*, *supra*.

Under the circumstances of this case, we cannot agree that petitioner's interlocutory appeal failed to raise a "serious and unsettled" question. Although the Court of Appeals had ruled in *Halperin* v. *Kissinger* that the President was not en-

titled to absolute immunity, this Court had never so held. And a petition for certiorari in *Halperin* was pending in this Court at the time petitioner's appeal was dismissed. In light of the special solicitude due to claims alleging a threatened breach of essential presidential prerogatives under the separation of powers, see *United States* v. *Nixon*, 418 U. S. 683, 691–692 (1974), we conclude that petitioner did present a "serious and unsettled" and therefore appealable question to the Court of Appeals. It follows that the case was "in" the Court of Appeals under § 1254 and properly within our certiorari jurisdiction.[23]

B

Shortly after petitioner had filed his petition for ceriorari in this Court and respondent had entered his opposition, the parties reached an agreement to liquidate damages.[24] Under its terms the petitioner Nixon paid the respondent Fitzgerald a sum of $142,000. In consideration Fitzgerald agreed to ac-

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[23] There can be no serious doubt concerning our power to review a court of appeals' decision to dismiss for lack of jurisdiction—a power we have exercised routinely. See, *e. g.*, *Gardner* v. *Westinghouse Broadcasting Co.*, 437 U. S. 478 (1978). If we lacked authority to do so, decisions to dismiss for want of jurisdiction would be insulated entirely from review by this Court.

Nor, now that we have taken jurisdiction of the case, need we remand to the Court of Appeals for a decision on the merits. The immunity question is a pure issue of law, appropriate for our immediate resolution. Especially in light of the Court of Appeals' now-binding decision of the issue presented, concerns of judicial economy fully warrant our decision of the important question presented.

[24] Respondent filed a copy of this agreement with the Clerk of this Court on August 24, 1981, as an appendix to his Brief in Opposition to a Motion of Morton, Ina, David, Mark and Gary Halperin to Intervene and for Other Relief. On June 10, 1980, prior to the Court's action on the petition for certiorari, counsel to the parties had advised the Court that their clients had reached an agreement to liquidate damages, but that there remained a live controversy. Counsel did not include a copy of the agreement in their initial submission.

cept liquidated damages of $28,000 in the event of a ruling by this Court that petitioner was not entitled to absolute immunity. In case of a decision upholding petitioner's immunity claim, no further payments would be made.

The limited agreement between the parties left both petitioner and respondent with a considerable financial stake in the resolution of the question presented in this Court. As we recently concluded in a case involving a similar contract, "Given respondents' continued active pursuit of monetary relief, this case remains 'definite and concrete, touching the legal relations of parties having adverse legal interests.'" *Havens Realty Co.* v. *Coleman*, —— U. S. ——, —— (1982), quoting *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240–241 (1937).

III

A

This Court consistently has recognized that government officials are entitled to some form of immunity from suits for civil damages. In *Spalding* v. *Vilas*, 161 U. S. 483 (1896), the Court considered the immunity available to the Postmaster General in a suit for damages based upon his official acts. Drawing upon principles of immunity developed in English cases at common law, the Court concluded that "[t]he interests of the people" required a grant of absolute immunity to public officers. *Id.*, at 498. In the absence of immunity, the Court reasoned, executive officials would hesitate to exercise their discretion in a way "injuriously affect[ing] the claims of particular individuals," *id.*, at 499, even when the public interest required bold and unhesitating action. Considerations of "public policy and convenience" therefore compelled a judicial recognition of immunity from suits arising from official acts.

> "In exercising the functions of his office, the head of an Executive Department, keeping within the limits of his

> authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government, if he were subjected to any such restraint."

Id., at 498.

Decisions subsequent to *Spalding* have extended the defense of immunity to actions besides those at common law. In *Tenney* v. *Brandhove*, 341 U. S. 367 (1951), the Court considered whether the passage of 42 U. S. C. § 1983, which made no express provision for immunity for any official, had abrogated the privilege accorded to state legislators at common law. *Tenney* held that it had not. Examining § 1983 in light of the "presuppositions of our political history" and our heritage of legislative freedom, the Court found it incredible "that Congress . . . would impinge on a tradition so well grounded in history and reason" without some indication of intent more explicit than the general language of the statute. *Id.*, at 376. Similarly, the decision in *Pierson* v. *Ray*, 386 U. S. 547 (1967), involving a § 1983 suit against a state judge, recognized the continued validity of the absolute immunity of judges for acts within the judicial role. This was a doctrine "'not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.'" *Id.*, at 554, quoting, *Scott* v. *Stansfield*, L.R. 3 Ex. 220, 223 (1868). See *Bradley* v. *Fisher*, 13 Wall. 335 (1872). The Court in *Pierson* also held that police officers are entitled to a qualified immunity protecting them from suit when their official acts are performed in "good faith." *Id.*, at 557.

In *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974), the Court considered the immunity available to state executive officials in a

§ 1983 suit alleging the violation of constitutional rights. In that case we rejected the officials' claim to absolute immunity under the doctrine of *Spalding* v. *Vilas*, finding instead that state executive officials possessed a "good faith" immunity from § 1983 suits alleging constitutional violations. Balancing the purposes of § 1983 against the imperatives of public policy, the Court held that "in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based." *Id.*, at 247.

As construed by subsequent cases, *Scheuer* established a two-tiered division of immunity defenses in § 1983 suits. To most executive officers *Scheuer* accorded qualified immunity. For them the scope of the defense varied in proportion to the nature of their official functions and the range of decisions that conceivably might be taken in "good faith". This "functional" approach also defined a second tier, however, at which the especially sensitive duties of certain officials—notably judges and prosecutors—required the continued recognition of absolute immunity. See, *e. g.*, *Imbler* v. *Pachtman*, 424 U. S. 409 (1976) (state prosecutors possess absolute immunity with respect to the initiation and pursuit of prosecutions); *Stump* v. *Sparkman*, 435 U. S. 349 (1978) (state judge possesses absolute immunity for all judicial acts).

This approach was reviewed in detail in *Butz* v. *Economou*, 438 U. S. 478 (1978), when we considered for the first time the kind of immunity possessed by *federal* executive officials who are sued for constitutional violations.[25] In *Butz* the Court rejected an argument, based on decisions involving federal officials charged with common law torts, that all high

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[25] *Spalding* v. *Vilas*, *supra*, was distinguished on the ground that the suit against the Postmaster General had asserted a common law—and not a constitutional—cause of action. See *Butz*, *supra*, 438 U. S., at 493–495.

federal officials have a right to absolute immunity from constitutional damage actions. Concluding that a blanket recognition of absolute immunity would be anomalous in light of the qualified immunity standard applied to state executive officials, 438 U. S., at 504, we held that federal officials generally have the same qualified immunity possessed by state officials in cases under § 1983. In so doing we reaffirmed our holdings that some officials, notably judges and prosecutors, "because of the special nature of their responsibilities," *id.*, at 511, "require a full exemption from liability." *Id.*, at 508. In *Butz* itself we upheld a claim of absolute immunity for administrative officials engaged in functions analogous to those of judges and prosecutors. *Ibid.* We also left open the question whether other federal officials could show that "public policy requires an exemption of that scope." *Id.*, at 506.

B

Our decisions concerning the immunity of government officials from civil damage liability arguably have not defined a straight line of doctrinal development. Nonetheless, a consistent approach has run throughout. In addressing claims of entitlement to immunity, this Court has recognized that "the law of privilege as a defense to damage actions against officers of Government has 'in large part been of judicial making,'" *Butz* v. *Economou*, *supra*, 438 U. S., at 501–502, quoting *Barr* v. *Matteo*, 360 U. S. 564, 569 (1959); *Doe* v. *McMillan*, 412 U. S. 306, 318 (1973), and that the "federal courts are . . . competent to determine the appropriate level of immunity" of state and federal officials, *Butz* v. *Economou*, *supra*, 438 U. S., at 503. Our decisions of course have been guided by federal statutes and the Constitution. Our cases under § 1983 formally have involved statutory construction. See, *e. g.*, *Tenney* v. *Brandhove*, 341 U. S. 367 (1951). Other decisions rest either on the literal text of the Constitution, *e. g.*, *Powell* v. *McCormack*, 395 U. S. 486, 506 (1969) (recognizing immunity of Congressmen under Speech and Debate Clause),

or on inferences of purpose drawn from constitutional language and structure, *e. g.*, *Gravel* v. *United States*, 408 U. S. 606, 618 (1972) (extending congressional immunity to a congressional aide, in order to "implement [the] fundamental purpose" of the Speech and Debate Clause). Cf. *Butz* v. *Economou*, *supra*, 438 U. S., at 508–517. Nonetheless, at least in the absence of explicit guidance from the Congress, in deciding immunity questions we have relied explicitly on consideration of public policy comparable to those traditionally recognized by courts at common law.[26] We also have examined the scope of the immunity historically afforded to particular officials at common law. See *Butz* v. *Economou*, *supra*, 438 U. S., at 508; *Imbler* v. *Pachtman*, 424 U. S. 409, 421 (1976).

This case now presents the claim that the President of the United States is shielded by absolute immunity from civil damages liability. In the case of the President the historical and policy inquiries tend to converge. Because the Presidency did not exist through most of the development of common law, any historical analysis must draw its evidence primarily from our constitutional structure and heritage. From both sources the relevant evidence involves an ongoing effort to identify the appropriate separation of powers among the branches of government—a concern that also forms the core of our inquiry involving those considerations of public policy traditionally weighed by courts at common law.

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[26] At least three basic rationales support immunity for public officials. First, competent and responsible individuals may be deterred from entering public service in the first place. Second, the prospect of damages liability may render officials unduly cautious in the discharge of their public responsibilities. See *Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (CA2 1949), cert. denied, 339 U. S. 949 (1950). Third, public servants may be distracted from their duties by the need to defend frequent lawsuits. See generally Freed, Executive Official Immunity for Constitutional Violations: An Analysis and a Critique, 72 Nw. L. Rev. 526, 529–530 (1977).

IV

Here a former President asserts his immunity from civil damage claims of two kinds. He stands named as a defendant in a direct action under the Constitution and two statutory actions under federal laws of general applicability. In neither case has Congress taken express legislative action to subject the President to civil liability for his official acts.[27]

Applying the principles of our cases to claims of this kind, we hold that petitioner, as a former President of the United States, is entitled to absolute immunity from damages liability predicated on his official acts. We consider this immunity a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and justified by considerations of public policy.

A

The President occupies a unique position in the constitutional scheme. Article II of the Constitution provides that "The executive Power shall be vested in a President of the United States. . . ." This grant of authority establishes the President as the chief constitutional officer of the Executive branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity. These include the administration of justice—it is the President who is charged constitutionally to "take care that the laws be faithfully executed";[28] the conduct of foreign affairs—a realm in which the Court has recognized that "It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information

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[27] We know of no instance in the history of our country in which Congress has given serious consideration to imposing civil damage suit liability on a President. A congressional attempt to do so would present a serious constitutional issue that we have no occasion to consider in this case.

[28] U. S. Const., Art II, § 3.

properly held secret";[29] and management of the personnel of the Executive branch—a task for which "imperative reasons requir[e] an unrestricted power [in the President] to remove the most important of his subordinates in their most important duties."[30]

In arguing that the President is entitled only to qualified immunity,[31] the respondent relies on cases in which we have recognized immunity of this scope for governors and cabinet officers. *E. g.*, *Butz* v. *Economou*, *supra*; *Scheuer* v. *Rhodes*, *supra*. We find these cases to be inapposite. The President's unique status under the Constitution distinguishes him from other executive officials.[32]

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[29] *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U. S. 103, 111 (1948).

[30] *Myers* v. *United States*, 272 U. S. 52, 134–135 (1926).

[31] Under the "good faith" standard, as formulated in such cases as *Wood* v. *Strickland*, 420 U. S. 308, 322 (1975), an official would be held immune from damages liability unless "he knew or reasonably should have known that the action he took within his sphere of official responsibility" was unconstitutional or "he took the action with malicious intention to cause a deprivation of constitutional rights or other injury. . . ."

[32] Noting that the "Speech and Debate Clause" provides a textual basis for congressional immunity, respondent argues that the Framers must be assumed to have rejected any similar grant of Executive immunity. Petitioner, on the other hand, offers historical arguments that the Framers affirmatively assumed presidential immunity to have been established by the adoption of the constitutional scheme. Although we need not embrace petitioner's argument in order to decide this case, we do reject respondent's contention that the constitutional text and structure somehow prohibit a judicial recognition of absolute immunity. There are two difficulties with respondent's argument. First, a specific textual basis has not been considered a prerequisite to the recognition of immunity. No provision expressly confers judicial immunity. Yet the immunity of judges is well settled. See, *e. g.*, *Bradley* v. *Fisher*, 13 Wall 335 (1872); *Stump* v. *Sparkman*, *supra*. Second, this Court already has established that absolute immunity may be extended to certain officials of the Executive Branch. *Butz* v. *Economou*, *supra*, 438 U. S., at 511–512; see *Imbler* v. *Pachtman*, *supra*, (extending immunity to prosecutorial officials within the Executive branch).

Similarly, the importance and scope of the President's powers and duties render him particularly vulnerable to suits for civil damages.[33] In view of the special prominence of his office and the effect of his actions on countless people, the President would be an easily identifiable target of damage actions by disgruntled citizens.[34] The matters with which a President must concern himself are likely to "arouse the most intense feelings." *Pierson* v. *Ray*, *supra*, 386 U. S., at 554. Yet it is precisely in such cases that there exists the greatest public interest in providing the President "the maximum ability to deal fearlessly and impartially with" the duties of his office. *Ferri* v. *Ackerman*, 444 U. S. 193, 203 (1979) (footnote omitted). For example, it would be intolerable to instill in the President a hesitancy to remove inefficient or even disloyal personnel. Exposure of the President to damages actions also could distort the process of decisionmaking at the highest levels of the executive branch. Anticipating lawsuits against the President, the President and his advisers naturally would have an incentive to devote scarce energy, not to performance of their public duties, but to compilation of a record insulating the President from subsequent liability. In view of the singular importance of the President's duties, the threatened diversion of his energies by private lawsuits would raise unique risks to public policy.[35]

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[33] Cf. J. Story, Commentaries on the Constitution of the United States, § 1563, at 418-419 (1833 ed.):

"There are . . . incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions, which are confided to it. Among these, must necessarily be included the power to perform them . . . . The president cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability."

[34] These dangers are significant even though there is no historical record of numerous suits against the President, since a right to sue federal officials for damages for constitutional violations was not even recognized until *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971).

[35] Even in the case of officials possessing absolute immunity, this Court generally has held that this immunity extends only to acts in performance

B

In deference to the President's singular constitutional mandate, the courts traditionally have asserted their jurisdiction over him with respectful caution and restraint. This Court

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of particular functions. See *Butz* v. *Economou*, *supra*, 438 U. S., at 508–517; cf. *Imbler* v. *Pachtman*, *supra*, 424 U. S., at 430–431. In the case of the President, however, powerful reasons counsel rejection of a selective approach.

Under the Constitution and laws of the United States the President has discretionary responsibilities in a broad variety of areas, many of which are highly sensitive. In many cases it would be difficult to determine which Presidential "function" encompassed a particular action. Thus, in order to administer functional distinctions among Presidential actions, judges frequently would need to inquire into the *purpose* for which acts were taken. Inquiries of this kind could be highly intrusive.

In determining the proper scope of an absolute privilege, this Court repeatedly has refused to draw lines finer than history and reason would support. See, *e. g.*, *Spalding* v. *Vilas*, *supra*, 161 U. S., at 498 (privilege extends to all matters "committed by law to [an official's] control or supervision"); *Barr* v. *Matteo*, *supra*, 360 U. S., at 575 (fact "that the action here taken was within the outer perimeter of petitioner's line of duty is enough to render the privilege applicable. . . ."); *Stump* v. *Sparkman*, *supra*, 435 U. S., at 363 and n. 12 (judicial privilege applies even to acts occurring outside "the normal attributes of a judicial proceeding"). In view of the special nature of the President's constitutional office, we think it appropriate to extend to him absolute immunity from damage actions based on acts within the "outer perimeter" of the area of his official responsibility.

In this case respondent argues that petitioner Nixon would have acted outside the perimeter of his duties by ordering the discharge of respondent Fitzgerald, who was lawfully entitled to retain his job in the absence of "such cause as will promote the efficiency of the service." Brief for Respondent, at 39, citing 5 U. S. C. § 7512(a). Because Congress has granted this legislative protection, petitioner argues, no federal official could, within his authority, cause Fitzgerald to be dismissed without satisfying this standard of proof. This construction of the President's authority would subject him to trial on every allegation that an allegedly tortious action was taken for a forbidden purpose. Adoption of this construction thus would deprive absolute immunity of its intended effect.

It clearly is within the President's authority to "prescribe" the manner in which the Secretary will "conduct the business" of the Air Force. 10

never has held that courts may compel the President to perform even ministerial functions.[36] By contrast, injunctions compelling action by other officials long have been upheld.[37] A similar distinction is reflected in the approach of this Court

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U. S. C. § 8012(b). Because this mandate includes the authority to prescribe reorganizations and reductions in force, petitioner's alleged wrongful acts lay well within the outer perimeter of his authority.

[36] Although this issue has not been faced squarely by the Court, there have been strong statements in previous opinions asserting the immunity of the President from judicial orders. In *Mississippi* v. *Johnson*, 71 U. S. 475, 501 (1866), the Court stated: "we are fully satisfied that this court has no jurisidiction of a bill to enjoin the President in the performance of his official duties; and that no such bill ought to be received by us." And in *Kendall* v. *United States*, 12 Pet. 524, 610 (1838), it is stated: "The executive power is vested in a President; and as far as his powers are derived from the consitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeaching power."

Even in *United States* v. *Nixon*, the court held that Presidential conversations and correspondence enjoy a "presumptive privilege" that is "inextricably rooted in the separation of powers." 418 U. S., at 708. We suggested that this privilege may be more absolute when matters of diplomacy or national security are involved. *Id.*, at 706, 710–711.

Strong historical considerations support the traditional judicial reluctance to enjoin action by the President. At the time of the first Congress, Vice President John Adams and Oliver Ellsworth, Senator from Connecticut, were reported as stating that "the President, personally, was not subject to any process whatever; could have no action, whatever, brought against him; and above the power of all judge, justices, etc." since otherwise a court could "stop the whole machinery of government." 2 W. Maclay, Sketches of Debate in the First Senate of the United States 152 (Harris ed. 1880). Justice Story offered a similar argument somewhat later. See 3 J. Story, Commentaries on the Constitution of the United States § 1563, at 418–419 (1st ed. 1833).

It also is clear that Thomas Jefferson believed the President not to be subject to judicial process. When Chief Justice Marshall held in *United States* v. *Burr*, 25 Fed. Cas. 30 (1807), that a subpoena duces tecum can be issued to a President, Jefferson protested strongly, and stated his broader view of the proper relationship between the Judiciary and the President:

"The leading principle of our Constitution is the independence of the Legislature, executive and judiciary of each other, and none are more jealous of this than the judiciary. But would the executive be independent of

to cases in which various officials have claimed an evidentiary privilege. The courts generally have looked to the common law to determine the scope of an official's privilege.[38] In considering claims by the President, however, we have recognized that Presidential immunity is "rooted in the separation of powers under the Constitution." *United States* v. *Nixon*, 418 U. S. 683, 708 (1974).

It is settled law that the separation of powers doctrine does not bar every exercise of jurisdiction over the President of the United States. See, *e. g.*, *United States* v. *Nixon*, *supra*; *United States* v. *Burr*, 25 Fed. Cases 191, 196 (1807); cf. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952).[39] But our cases also have recognized that a court, before exercising jurisdiction, must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the executive branch.[40] When judicial action is needed to serve broad pub-

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the judiciary, if he were subject to the *commands* of the latter, & to imprisonment for disobedience; if the several courts could bandy him from pillar to post, keep him constantly trudging from north to south & east to west, and withdraw him entirely from his constitutional duties? The intention of the Constitution, that each branch should be independent of the others, is further manifested by the means it has furnished to each, to protect itself from enterprises of force attempted on them by the others, and to none has it given more effectual or diversified means than to the executive." 10 The Works of Thomas Jefferson 404n. (P. Ford ed. 1905) (quoting a letter from President Jefferson to a prosecutor at the Burr trial) (emphasis in the original). See also 5 D. Malone, Jefferson and His Time: Jefferson the President 320–325 (1974).

[37] See *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952) (injunction directed to Secretary of Commerce); *Kendall* v. *United States*, *supra* (mandamus to enforce ministerial duty of the Postmaster General).

[38] See *United States* v. *Reynolds*, 345 U. S. 1, 6–7 (1953) (Secretary of the Air Force); *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 323–324 (DDC 1966), aff'd 384 F. 2d 979 (CADC), cert denied, 389 U. S. 952 (1967) (Department of Justice officials).

[39] Although the President was not a party, the Court enjoined the Secretary of Commerce from executing a direct presidential order. See 343 U. S., at 583.

[40] See *Nixon* v. *General Services Administration*, 433 U. S. 425, 439

lic interests—as when the Court acts, not in derogation of the separation of powers, but to maintain their proper balance, cf. *Youngstown Sheet & Tube Co.* v. *Sawyer*, *supra*—the exercise of jurisdiction has been held warranted. In the case of this merely private suit for damages based on a President's official acts, we hold it is not.[41]

V

A rule of absolute immunity for the President will not leave the Nation without sufficient remedies for misconduct on the part of the chief executive.[42] There remains first the constitutional remedy of impeachment.[43] In addition, Presi-

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(1977); *United States* v. *Nixon*, 418 U. S. 683 (1974).

[41] It never has been denied that absolute immunity may impose a serious cost on the individuals whose rights have been violated. As Judge Learned Hand wrote in *Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (CA2 1949), cert denied, 339 U. S. 949 (1950):

"It does indeed go without saying that an oficial, who is in fact guilty of using his powers to vent his spleen upon others, or for any personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for . . . [denying recovery] is that it is impossible to know whether the claim is well founded until the case has been tried, and to submit all officials, the innocent as well as the guilty, to the burden of trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute. . . . As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative."

In weighing the balance of advantages, this Court has found that there is a lesser public interest in actions for civil damages than, for example, in criminal prosecutions. See *United States* v. *Gillock*, 445 U. S. 360, 371–373 (1980); cf. *United States* v. *Nixon*, *supra*, 418 U. S., at 711–712 and n. 19 (basing holding on special importance of evidence in a criminal trial and distinguishing civil actions as raising different questions not presented for decision).

[42] The presence of alternative remedies has played an important role in our previous decisions in the area of official immunity. *E. g.*, *Imbler* v. *Pachtman*, *supra*, 424 U. S., at 428–429 ("We emphasize that the immunity of prosecutors from liability in suits under § 1983 does not leave the public powerless to deter misconduct or to punish that which occurs.").

[43] The same remedy plays a central role with respect to the misconduct of

dents may be prosecuted criminally, at least after they leave office. Moreover, there are informal checks on Presidential action that do not apply with equal force to other executive officials. The President is subjected to constant scrutiny by Congress and by the press. The vigilance of these institutions may serve to deter Presidential abuses of office, as well as to make credible the threat of impeachment.[44] Other incentives to avoid misconduct may include a desire to earn reelection, the need to maintain prestige as an element of presidential influence, and a President's traditional concern for his historical stature.

The existence of alternative remedies and deterrents establishes that absolute immunity will not place the President "above the law." For the President, as for judges and prosecutors, absolute immunity merely precludes a particular private remedy for alleged misconduct in order to advance compelling public ends.

VI

For the reasons stated in this opinion, the decision of the Court of Appeals is reversed and the case remanded for action consistent with this opinion.

So ordered.

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federal judges, who also possess absolute immunity. See Kaufman, Chilling Judicial Independence, 88 Yale L.J. 681, 690–706 (1979). Congressmen may be removed from office by a vote of their colleagues. U. S. Const., Art. I, § 5, cl. 2.

[44] Prior to petitioner Nixon's resignation from office, the House Judiciary Committee had convened impeachment hearings. See generally Report of the Committee on the Judiciary of the House of Representatives: Impeachment of Richard M. Nixon President of the United States, H.R. Rep. No. 93–1305 (1974).